SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 58

A. L. MECHLING BARGE LINES, INC., ET AL., APPELLANTS,

vs.

UNITED STATES, ET AL.

No. 59

BOARD OF TRADE OF THE CITY OF CHICAGO, APPELLANT,

vs.

UNITED STATES, ET AL.

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[fol. 1] Placita (omitted in printing).

[fol. 2]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

Civil Action No. 61 C 169

Three-Judge Court Requested

A. L. Mechling Barge Lines Inc., a corporation, Ira Bookwalter, Cullom Cooperative Grain Company, Charles Treasure, Griswold Grain Company and Mazon Farmers Elevator, Plaintiffs,

vs.

United States of America and Interstate Commerce Commission, Defendants.

Complaint—Filed January 31, 1961

1. This action is brought under the provisions of 28 U. S. C. §§ 1336, 1398, 2284 and 2321-2325, inclusive, and 5 U. S. C. § 1009 to enjoin, set aside, annul and suspend a certain report and Fourth Section Order No. 19346 of the Interstate Commerce Commission, hereinafter called the Commission, made and entered in a proceeding entitled "Fourth Section Application No. 33955, Corn and Corn Products, Illinois to Official Territory," by Division 2 of the Commission on June 8, 1960, and a further order made and entered by the Commission on November 18, 1960, in said proceeding denying the petition of these plaintiffs for reconsideration and reargument of the aforesaid order of [fol. 3] Division 2. Copies of the report of the Commission and orders are attached hereto as Exhibits 1 and 2, respectively, and made a part hereof.

Said orders of the Commission made permanent certain authority previously temporarily given by the Commission to the New York Central Railroad Company and connecting railroads to charge lower rates for the transportation of corn and certain corn products from stations on that line of the New York Central Railroad's track extending west from Kankakee, Illinois (hereinafter called the Kankakee Belt) to destinations in that part of the northeast portion of the United States known as Official Territory, than said railroads contemporaneously charge for the shorter transportation of corn and corn products from intermediate stations at Kankakee, Illinois, and in Indiana, on the same routes, to the same destinations. In the absence of specific authorization by the Commission such rates would be prohibited by Section 4 of the Interstate Commerce Act, 49 U.S.C. § 4. The Kankakee Belt runs roughly parallel to that part of the Illinois River between Morris and Spring Valley, Illinois, at distances ranging from four to thirty miles from the said river.

2. Plaintiff, A. L. Mechling Barge Lines Inc., hereinafter called Mechling, is a corporation organized under the laws of the State of Delaware, having its principal place of business at Joliet, Illinois. It is a common carrier by water in [fol. 4] interstate commerce, and in intrastate commerce within the State of Illinois, and it holds a certificate of public convenience and necessity under Part III of the Interstate Commerce Act, 49 U.S.C. §§ 901 *et seq.* As such, it has for a number of years been a principal carrier by water of corn from ports on the Illinois River to Chicago, Illinois, and as such is a competitor with the New York Central Railroad Company operating the Kankakee Belt for the transportation of corn grown in the northern Illinois corn producing area.

3. Plaintiffs Ira Bookwalter, Cullom Cooperative Grain Company, Charles Treasure, Griswold Grain Company and Mazon Farmers Elevator are operators of grain elevators in Essex, Cullom, Gardner, Saunemin, Mazon, Verona and Cole City, Illinois, respectively. Cullom Cooperative Grain Company and Mazon Farmers Elevator are farm cooperatives organized under the laws of Illinois and owned by

farmers with which they do business. Griswold Grain Company is a business corporation organized under the laws of Illinois. Ira Bookwalter and Charles Treasure are individual proprietors resident in Illinois. Said elevators are located in the said corn producing area in Northern Illinois. Each of the plaintiffs named in this paragraph at all times mentioned herein sought to, and did, engage in the purchase of corn from farmers in its respective area and resale of that corn to various markets, among them the subterminal [fol. 5] elevators located at ports on the Illinois River. In such activity these plaintiffs, prior to the reduction of rail rates now permanently authorized by said orders of the Commission and Division 2, encountered only normal or no competition from operators of similar elevators located on the Kankakee Belt by reason of their distance from such Kankakee Belt elevators. Since such rates have been reduced as authorized by the Commission in said orders, these plaintiffs have been unable to compete with stations on the Kankakee Belt for the purchase of corn in the territory which these plaintiffs served and face the destruction of their business and loss of their investments.

4. All plaintiffs parties to this complaint filed timely protests with the Commission against the grant of authority given the railroads in said orders, and all appeared at and participated in the hearings held by the Commission in Fourth Section Application No. 33955, and are proper plaintiffs herein by reason of the provisions of 40 U.S.C. § 2323 and 5 U.S.C. § 1009.

5. The rates in question on corn and corn products from stations on the Kankakee Belt to destinations east of Kankakee, Illinois, consist of two factors. The first factor is the rate for transportation from the Kankakee Belt station to Kankakee. (It is this factor which said orders authorize the railroads to reduce.) The second factor is the [fol. 6] reshipping rate from Kankakee to the ultimate eastern destination. This factor remained unchanged and is in all instances the same as the reshipping rate from Chicago which is charged on corn which has been brought to Chicago by Illinois River water carriers, one of which is plaintiff Mechling. The first factor, which is charged for

transportation from Kankakee Belt stations to Kankakee, is the rail rate which is competitive with Mechling's rates from Illinois Waterway ports near the Kankakee Belt to Chicago. It was the reduction in this water-competitive factor of the rail rates that gave rise to the necessity for the submission by the railroads of their application to the Commission for relief from the prohibition of Section 4 of the Interstate Commerce Act (49 U.S.C. § 4). Prior to such reduction, said water-competitive rail rates had ranged from 13.5¢ to 24.5¢ per hundred pounds according to distance; but, as now reduced on authority of the orders complained of, they are only a flat 6¢ per hundred pounds regardless of distance from all stations on the Kankakee Belt.

6. The record made before the Commission showed and the Commission's examiner who heard the witnesses and all the evidence found, that the reduced 6¢ rail rates, which is the factor competitive with water transportation, is not compensatory to the New York Central Railroad Company [fol. 7] (as required by said Section 4 of the Interstate Commerce Act (49 U.S.C. § 4). Neither Division 2 of the Commission, nor the full Commission questioned that fact or disturbed that finding, but accepted it. They disregarded it, however, erroneously deciding as a matter of law that only the sum of the water-competitive 6¢ factor and the said second factor, which is not water-competitive, need be compensatory, and that the railroad can lawfully be permitted to make up the loss resulting from its rail transportation at the reduced non-compensatory water-competitive 6¢ rate with its other and extra revenue, obtained from the higher non-water-competitive reshipping rates from Kankakee to eastern destinations.

7. Plaintiffs and many other parties presented evidence on the record that the aforesaid reduced rail rate from Kankakee Belt rail stations to Kankakee was lower than necessary to meet water competition. The Commission's examiner so found, after careful review of all the evidence of record. The Commission, however, ignored the direct evidence of record before it and adopted certain speculations and conclusions not supported by evidence in the rec-

ord as its basis for finding that the reduced rate was no lower than necessary to meet water competition.

8. Plaintiff Mechling presented evidence showing that the aforesaid reduced rail rate into Kankakee served to de- [fol. 8] prive Mechling of its inherent low cost advantage as a water carrier over rail carriers, contrary to the National Transportation Policy (49 U.S.C. preceding § 1) which requires that such low cost advantage be preserved. The Commission as a matter of law erroneously held that Mechling had no right to have this inherent low cost advantage preserved and erroneously concluded as a matter of law that the reduction of the said water-competitive rail rate into Kankakee to a non-compensatory level did not amount to a destructive competitive practice.

9. It was admitted and testified on the record before the Commission by the representative and witness of the New York Central Railroad Company, owner and operator of said Kankakee Belt (and disputed by no one) that under the railroad tariffs in question and division agreements between the railroads, the New York Central Railroad will and does transport corn from Kankakee, Illinois, to Chicago, Illinois, and that such other connecting railroads then will and do carry such corn, and products thereof, from Chicago to destinations east of Buffalo and Pittsburgh for a rate division which is substantially (to-wit, 13¢) lower than the rate charged by those same rail carriers for transportation to those same destinations of corn or products milled from corn which has been brought to Chicago by [fol. 9] barge. Plaintiffs challenged this prima facie discrimination against connecting water carriers in violation of Section 3(4) of the Interstate Commerce Act (49 U.S.C. Section 3(4) and sought to establish all details and aspects thereof but were prevented from so doing by a ruling by the Commission's Examiner that divisions of rates were not pertinent to any question of discrimination. The Commission and Division 2 thereof refused to reverse this ruling despite the proper presentation to them of plaintiffs' exception thereto.

10. The Commission's Examiner who heard the witnesses and the evidence carefully reviewed the evidence of record

and found, upon this application of the railroads to be relieved from the prohibition of Section 4 of the Interstate Commerce Act (49 U.S.C. § 4): "Before such relief may be granted, applicants must show that the proposed rate is reasonably compensatory and no lower than necessary to meet the competition; that they have not done so is crystal clear."; that the said water-competitive rail rate faces these elevator-owner plaintiffs with elimination of their business and this plaintiff water carrier with the elimination of water competition with the rail line of the Kankakee Belt; the report of the Commission Examiner is hereto attached as Exhibit 3 and made a part hereof. The Commission, however, by the orders here sought to be enjoined, erroneously and unlawfully granted [fol. 10] to the railroads authorization to maintain the protested rates in force while maintaining higher rates to the same destinations over the same lines from intermediate points in Illinois and Indiana, and denied the petition of these plaintiffs for reconsideration.

11. The reduced rail rates authorized in said orders have diverted virtually all of the corn from the areas in which plaintiff elevator operators made their corn purchases to elevators situated on the Kankakee Belt, and by reason of this diversion of corn to rail movement have reduced the movement by barge of corn from the Illinois River to Chicago to an uneconomically low volume. Said orders will result in continuation of this injury to these plaintiffs.

12. In entering the aforesaid orders the Commission erred in that:

(a) Said orders are arbitrary, capricious and in violation of law;

(b) Said orders are against the manifest weight of the evidence of record and without support of substantial evidence of record;

(c) Said orders do not contain sufficient findings to show compliance by the Commission with substantive requirements of law in such cases;

[fol. 11] (d) The Commission held, contrary to law, that the reduced water-competitive rate need not be compensatory to the New York Central Railroad;

(e) Its order permits the New York Central Railroad to subsidize the non-compensatory rate which competes with water transportation from revenues derived from traffic for which no water competition exists;

(f) The Commission ignored the evidence of record in finding that the rates complained of herein were no lower than necessary to meet water competition and instead relied on certain conclusions without support of substantial evidence of record;

(g) The Commission held, contrary to the law, as stated in the National Transportation Policy (note preceding Section 1, 49 U.S.C.) that, as a matter of law, that plaintiff Mechling had no right to have its inherent low cost advantage preserved;

(h) The Commission concluded as a matter of law, without any basis in any substantial evidence of the record, and contrary to law, that the reduction of the water-competitive rate into Kankakee did not amount to a destructive competitive practice;

[fol. 12] (i) The Commission refused to allow plaintiff to develop information with respect to certain divisions of the rates involved herein which discriminated against connecting water carriers in violation of Section 3(4) of the Interstate Commerce Act, 49 U.S.C. § 3(4);

(j) The Commission authorized the protested rates notwithstanding the Commission's Examiner's finding that the protested rates from Kankakee Belt stations to Kankakee were non-compensatory, were lower than necessary to meet competition and were destructively competitive and thus contrary to the express conditions established by Section 4 of the Interstate Commerce Act, 49 U.S.C. § 4.

13. By reason of the unlawful, arbitrary and capricious action of the Commission in entering the aforesaid order of June 8, 1960, and the Commission's refusal to reconsider and review the aforesaid order on November 18, 1960, plaintiffs have been and will continue to be subjected to irreparable damage if the relief hereinafter prayed for is not granted.

Wherefore, plaintiffs pray:

A. That, pursuant to 29 U.S.C. §§ 1336, 1398, 2284 and 2321-2325, inclusive, there shall be constituted to hear this case a special court of three (3) judges, at least one of whom shall be a circuit judge;

B. That the court, by interlocutory injunction, enjoin and restrain the operation of Fourth Section Order No. 19346 pending final hearing and determination of this suit.

C. That on final hearing of this cause the court adjudge that Fourth Section Order No. 19346, dated June 8, 1960, is unlawful, void, beyond the power of the Commission, arbitrary and capricious, and that judgment be entered setting aside, annulling, suspending and perpetually enjoining the operation of the said order.

D. That plaintiffs have such other and further relief as may be decreed proper by the Court.

Edward B. Hayes, Wilbur S. Legg, Attorneys for Plaintiffs.

Lord, Bissell & Brook, 135 South LaSalle Street, Chicago 3, Illinois, RAndolph 6-0466.

[fol. 14]

EXHIBIT I TO COMPLAINT

INTERSTATE COMMERCE COMMISSION

FOURTH SECTION APPLICATION NO. 33955
CORN AND CORN PRODUCTS, ILLINOIS TO OFFICIAL TERRITORY

Decided June 8, 1960

Authority granted, on conditions, to continue or to establish and maintain on corn products from origins in northern Illinois on that part of the New York Central Railroad's Kankakee Belt Line extending eastward from Moronts to Van's Siding, Ill., both inclusive, to points in central, trunkline and New England territories, rates composed of a combination of proportional rates to and from Kankakee, Ill., without observing the long-and-short-haul provision of Section 4 of the Interstate Commerce Act.

Richard J. Murphy, William C. Leiper, and *Daniel J. Sweeney* for applicants.

Freeman Bradford and *A. C. Schier* for interveners in support of the applicants.

Edward R. Hayes, Wilbur S. Legg, Nuel D. Belnap, Harold E. Spencer, Richard J. Hardy, Richard M. Freeman, James V. Springrose, Lawrence Farlow, James C. Scott, I. M. Funk, Ronald E. Tallyn, E. S. Herron, R. D. Erickson, and *J. S. Chartrand* for protestants.

REPORT OF THE COMMISSION

DIVISION 2, COMMISSIONERS HUTCHISON, McPHERSON, AND HERRING

BY DIVISION 2:

The parties filed exceptions to the report proposed by the examiner, to which replies were made. We have heard the parties in oral argument. Our conclusions differ from

those recommended in the proposed report. Exceptions and requested findings not discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

By this application, as amended, carriers parties to New York Central Railroad Company tariff I.C.C. No. 1169 and Agent H. R. Hinsch's tariff I.C.C. Nos. 4403 and 4499, [fol. 15] apply for authority to continue or to establish and maintain over their existing direct all-rail routes for the transportation of corn products from origins in northern Illinois on that part of the New York Central Railroad's Kankakee Belt Line extending eastward from Moronts to Van's Siding, Ill., both inclusive, to points in central, trunkline, and New England territories, rates composed of a combination of proportional rates to and from Kankakee, Ill., as hereinafter described, without observing the long-and-short-haul provision of Section 4 of the Interstate Commerce Act.

The schedules containing the rates and the application were protested by A. L. Mechling Barge Lines, Inc., Cargill, Inc., and the Waterways Freight Bureau, as well as by the Board of Trade of the City of Chicago, the Indiana Board of Trade, two state associations of Illinois elevators, the Illinois Grain Corporation, the Norris Grain Company, and others. The General Foods Corporation, Indianapolis Board of Trade, Evans Milling Company, Illinois Cereal Mills, and several operators of elevators on the Kankakee Belt Line of the New York Central Railroad intervened on behalf of the applicants. Suspension was denied and fourth-section relief was granted temporarily by order No. 18784, entered August 27, 1957, until further order after hearing.

However, on August 28, 1957, certain of the protestants filed an appeal with the United States District Court for the Northern District of Illinois, Eastern Division, to set aside the Commission's temporary fourth-section order and to enjoin the use of the rates without fourth-section relief. A temporary restraining order was issued on that date making the Kankakee combinations inoperative until No- [fol. 16] vember 28, 1957, when the court order was vacated and the court action dismissed.

A hearing has been held in the matter of the fourth-section relief sought and several of the respective parties introduced testimony and other evidence according as their interests were affected. In the interest of clarity the rates for which fourth-section relief is herein sought will be referred to as the proposed rates, and those in effect previously as the prior rates. Except as otherwise indicated all rates and charges are stated in amounts per 100 pounds, include the increase authorized in Ex Parte No. 206, and are subject to the increase authorized in Ex Parte No. 212.

The proposed reduced rates are designed to recapture traffic represented as having been lost to competing barge lines operating by way of Chicago in conjunction with rail lines beyond. The carriers do not desire to reduce existing rates at higher-rated intermediate points not affected by the same competitive conditions.

Historically, the rail rates on grain and grain products from northern Illinois, including the considered origins, to eastern destinations were combinations over Chicago, Ill., and later when single-factor rates were established they were made equal to the combinations, the rates on the corn products having been maintained uniformly .5-cent higher than the rates on grain. On traffic accorded transit, the local or flat rates were generally observed to the gateway points, for example Chicago or Kankakee, and the reshipping rates therefrom applied on the outbound movement, observing as minimum the single factor through rate or the [fol. 17] flat rate from the gateway, whichever was higher, in conformity with outstanding fourth-section relief.

In an effort to meet the competition of the barge-rail routes, effective December 15, 1956, the New York Central Railroad established a proportional rate of 5 cents (subsequently increased to 5.5 and 6 cents, respectively, under Ex Parte Nos. 206 and 212), minimum 100,000 pounds, on corn and corn products from the considered origins to Kankakee over its line direct for application in conjunction with the existing proportional or reshipping rates beyond on traffic milled-in-transit and finally destined to points in the western termini of eastern trunk lines and east thereof. At the same time, the through single-factor rates from these origins to final destination, as well as the flat rate from Kankakee to final destination, previously observed

as minimum in connection with the prior rates, were restricted so as not to apply when the combination of the proposed proportional rates to and from Kankakee to final destination is lower. The proposed rates were permitted to become effective at that time without protest and were published in the belief that outstanding relief protected any departures which might occur. However, it was subsequently discovered that by limiting the rates to points at the western termini of eastern trunk lines and east thereof, unauthorized departures were created at destinations in central territory. Moreover, by eliminating the application of the single-factor through rates from origin to final destination, as well as the flat rate from Kankakee to final destination as minimum, origin departures were created at Kankakee and points east, north, and south thereof. To eliminate the unauthorized destination departures the [fol. 18] same combination of proportionals was established for application on like traffic from the same origins to destinations in central territory effective July 30, 1957, which date was voluntarily postponed until August 29, 1957, and because of the temporary restraining order entered by the court did not become effective until November 28, 1957.

The considered rates, as indicated, are designed to meet the barge-rail combination rates over Chicago, comprising the local barge rates to Chicago and the rail reshipping rates to eastern destinations, which are the same as in effect from Kankakee. The local barge rates from 10 Illinois River ports[1] to Chicago ranged from 3.5 to 6 cents on December 5, 1957, and effective December 6, 1957, 3.65 to 6.25 cents when they were increased slightly. There is no milling-in-transit requirement for the application of the barge-rail combination rates. In arriving at the inbound proportional under the proposed rates, the weighted average barge rate of 4.625 cents on the barge movement for the period December 16, 1956 to November 11, 1957, from the 10 ports to Chicago was considered as the competitive rate. On the same movement the weighted average barge rate would be 4.825 cents effective December 6, 1957.

[1] Lockport, Joliet, Morris, Seneca, Ottawa, La Salle, Spring Valley, Hennepin, Henry, and Lacon, Ill.

The proposed rates have application only in connection with the reshipping rates on grain products insofar as they apply on certain corn products. In the first instance the corn is moved from its Belt origin to Kankakee or other [fol. 19] transit points in official territory under the flat rate. After milling-in-transit and reshipment of corn products, the inbound charges are readjusted on the basis of the proportional rate on corn to Kankakee and the reshipping rates on grain products from Kankakee, and the credit is applied to the outbound movement of corn products. Charges for the shrinkage and manufacturing loss remain on the basis of the local rate to the transit point.

The Kankakee Belt Line west of Kankakee roughly parallels the Illinois River in northern Illinois. Moronts is on the river about 4 miles from the nearest river port of Spring Valley, Ill., and Van's Siding, which is the most distant point from the river, is about 32 miles south of its nearest port of Joliet, Ill. The northern Illinois territory produces a surplus of corn. At one time, the corn moved over all-rail routes to eastern destinations. However, the development of commerce on the Illinois River about 20 years ago started a diversion of the all-rail movement to barge-rail routes extending from river ports by barge to Chicago, Ill., and thence by rail to eastern destinations. In 1935, 1940, and 1957, respectively, about 1.5, 19, and 59 million bushels of grain, including .7, 16 and 34 million bushels of corn, moved by barge from all Illinois River ports to Chicago. The bulk of the corn moved by barge originates at the 10 river ports which range from 4 to 36 highway miles from the Belt origins, and is drawn from farms ranging up to 40 miles from the ports.

The primary business available to the New York Central at the origin points is grain, predominantly corn, traffic. During 1954, 1955, and 1956, respectively, 467, 729, and 615 carloads of grain, including 305, 533, and 464 carloads [fol. 20] of corn originated thereat. Most of it was Commodity Credit Corporation corn[2] which is usually shipped by rail for export, and is not subject to the same competi-

[2] Corn under Government Control.

tive forces as "free" corn.[3] In 1957, however, for the 6-, 8-, and 12-month periods ended June 30, August 31, and December 31, 1957, respectively, 1,915, 2,411, and 2,681 carloads of corn were originated at the Belt origins.

The 1956 corn crop in the area was somewhat heavier than the 1955 crop, thus increasing the movement in 1957. During the period December 15, 1956, to August 30, 1957, hereinafter called the competition period, when the proposed rate was in effect the corn movement by barge from the 10 river ports to Chicago amounted to 493,668 tons, including 387,256 tons by protestant A. L. Mechling Lines, Inc.[4] Lockport and Joliet, the river ports nearest Chicago, are not affected by the reduced rate to the same extent as the other ports. From Hennepin, Henry, and Lacon, the three ports south of Moronts, the greater part of Mechling's corn business moved to the south in 1956 and north to Chicago in 1957. From the other five ports affected, Mechling's barge movement to Chicago was lower by 22,928 tons in the competition period than during the corresponding period a year earlier.

Cargill Incorporated, Illinois Grain Corporation, Norris Grain Corporation, W. W. Dewey Company, and Glidden Company, operate sub-terminal elevators at one or more [fol. 21] of the ports. Cargill's corn purchases at three elevators from the area south of the river dropped from 1,632,092 bushels in the period December 15, 1955 to August 31, 1956, to 1,171,329 bushels in the competition period. From the same area Illinois Grain purchased 854,326 and 365,005 bushels during the first 8 months of 1956 and 1957, respectively. Norris experienced purchase declines in 1957 under 1956 at three elevators. The decline at the one elevator most affected amounted to 646,380 bushels in the first 6 months of 1957 under the first 6 months of 1956. Dewey's purchases from four points on the Belt were reduced from 120,000 bushels in the first 8 months of 1956 to 15,000 bushels in the same period of 1957. Glidden's

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[3] Corn available on the open market.

[4] Includes Mechling's wholly-owned subsidiary, Marine Transit Company.

elevators were opened in the fall of 1956. Its limited experience indicates a decline in purchases in the area subsequent to the effectiveness of the proposed rate.

The river sub-terminal elevators are intermediate between the terminal elevators in Chicago and the country buyers in northern Illinois. They are generally operated by the terminal elevators and were established to accumulate corn for river movement. With the exception of Dewey, which purchases both from country buyers and direct from the farmer, this accumulation is by purchase through the country elevatorman. Originally the country elevators sold to buyers for all-rail movement. Their facilities were designed to receive grain from the farmers, assemble it in carload lots, and load it into rail cars, these being the same functions as to rail corn as are performed by the sub-terminal elevators to barge corn. The advent of river transportation and the establishment of sub-terminal elevators opened another outlet for the corn. In the years [fol. 22] immediately preceding the establishment of the proposed rate, when the corn rates on the Belt were prohibitively high, the country elevators near or at the Belt became, for the most part, buyers or merchandisers of corn for barge movement, and elevated only small quantities of corn for which there were local retail requirements. For his service, the country elevatorman realizes from 1 to 4 cents a bushel depending on whether he actually performs an elevation or merely serves as a merchandiser.

The corn is moved from the farms to the elevators in farmer-owned or for-hire trucks, the cost of which, in either case, is borne by the farmer. Most of the corn sold at the river comes directly from the farm with only a small portion coming from the country elevators. The for-hire truck rates are on a distance scale filed and fixed by the Illinois Commerce Commission. They range from 2 to 4 cents a bushel for distances ranging up to 30 miles.

Bids to the farmers are based on the price at the most advantageous terminal market less the country buyers mark-up and transportation costs. River bids are f.o.b. trucks at river elevator, while Belt bids are f.o.b. rail cars. At the Belt, the farmer stands the cost of elevation; at the river, he does not. Prior to the proposed rate, the free corn

sales of elevators on the Belt were made to the river elevators, because corn for river transportation commanded higher prices than corn for rail transportation. The higher prices were attributed to the ability of the river buyers to market the corn at low transportation costs over the all-rail routes. Since the effectiveness of the proposed rates, it became more profitable for these Belt elevators to ship by rail, and the farmers benefited by the competitive bidding. Despite their ability to pass on to the farmers the ad- [fol. 23] vantage of competitive bids these Belt elevators assert that the amount of corn handled by them has not increased. There is a difference in their business, however, for rather than performing merely the merchandising service on barge corn, they now perform an actual elevation on rail corn. Several country elevators with rail facilities from 3 to 11 miles from the Belt have established portable loaders on the Belt. The 14 supporting elevators contend that without a competitive rail rate, they would again be relegated to the status of merchandisers for barge movement and the investments in their elevators and facilities for rail shipment would be virtually destroyed.

Of the opposing country elevators, eight are located between the Illinois River and the Belt, two are south of the Belt, one is north of the river, and one is on the river and is not served by rail. The last mentioned buys corn from farmers as much as 18 miles south of the river or within six miles of the Belt. Although it has not been affected by the proposed rate, it recognizes the possibilty of some loss in its south territory. The others, though served by rail lines other than the Belt, sell most of their "free" corn at the river, and consequently have been adversely affected by the proposed rate. The majority have lost "free" corn business. Most seriously affected was one located at the same point as an elevator served by the Belt. Its business exceeded 250,000 bushels in each of the years 1955 and 1956, but it shipped only 31,000 bushels in 1957[1] and nothing in January, 1958. The total decline in "free" corn business [fol. 24] of all these country buyers, under 1956, was less

[1] The effectiveness of the proposed rate was enjoined from August 28, 1957 to November 28, 1957.

than 25 per cent. One of them shipped a portion of its 1957 business through an elevator on the Belt at a cost of over half of its usual commission on such sales. Another located midway between the Belt and the river, actually experienced a business increase, 1957 over 1956, with most of its corn going to the river. Its rail shipments declined from 258 carloads in 1956 to 78 carloads in 1957. Another believed that the proposed rate would be a temporary situation, and to retain its farmer customers it absorbed the difference, amounting to $1,800, between bids on corn in rail cars at competitive Belt elevators and bids in cars at its elevator.

The proposed rate has enabled the Belt elevators to outbid the middlemen seeking to purchase corn near the Belt area for river shipment. On January 30, 1958, the prices bid for corn per bushel were $1.09 in car at Missal, Ill., on the Belt, $1.04⅞ in car at Kernan, Ill., on another railroad, about three miles north of the Belt, and $1.075 in truck at the river. Since the Belt bid is f.o.b. freight car, an adjustment to eliminate the cost of elevation (averaging 2.5 cents per bushel) would place it one cent below the river bid at comparable stages in the transportation chain. There is little evidence that "free" corn moves by rail on other than the Belt line from stations between the Belt and the river. The Kernan bid less the cost of elevation would net the farmer $1.02⅜ in truck at Kernan. The river bid less the 2¾-cent truck rate to the river would net the farmer $1.04¾ in truck at Kernan.

The Farmers Grain Dealers Association of Illinois and the Illinois Grain Dealer's association, each of which has a membership of approximately 300 country elevators with [fol. 25] facilities at about 400 rail stations in Illinois, ask for the restoration of the former competitive position among their members. It is their position that the rate from one station on one railroad must be competitive with the rate from another station on another railroad; that such rail rates should be competitive with other modes of transportation; and that such fourth-section relief as may be necessary should be granted to enable the railroads to compete with Illinois River barge lines.

Opposed to any fourth-section relief is the Indiana Farm Bureau Cooperative Association, a federated cooperative of about 86 associations with a total membership, mostly farmers, of about 160,000. It is a member of both the Board of Trade of the city of Chicago which opposes, and the Indianapolis Board of Trade, Inc., which supports, the applicants. It operates a 5.5 million bushel elevator on the New York Central at Indianapolis, Ind., and a 2.5 million bushel elevator in Louisville, Ky. It handles about 25 million bushels of corn annually, a large part of which is marketed in official territory. Among its 150 to 200 Indiana shipping points are stations intermediate from Kankakee to eastern destinations on the New York Central from which the rates on milled-in-transit corn to those destinations are as much as 10 cents higher than the proposed rates. Combination rates on corn via barge to Chicago thence by rail to these destinations are lower than the local rates from intermediate Indiana destinations and are applicable over Kankakee as well as Chicago. Shifting some of the Belt corn from barge to rail, which is the effect of the proposed rates, would not alter the present competitive relationship at eastern markets between it and Indiana corn.

[fol. 26] In its study of the competitive situation, the New York Central made inquiries of corn processors at Kankakee, Paris, and Danville, Ill., and Indianapolis, Ind., as well as country elevators on the Belt. Three of the processors, General Foods Corporation at Kankakee, Illinois Cereal Mills at Paris, and Evans Milling Company at Indianapolis, support the proposed rate. Until the effectiveness of the proposed rate the corn purchases of General Foods in the northern Illinois territory for rail delivery amount to about 1.5 carloads a week. After the proposed rate became effective, it received 1,101 carloads during the first 8 months of 1957. In the same period, Illinois Cereal and Evans Milling received 327 and 219 carloads, respectively, from Belt origins. Immediately prior to 1957, Illinois Cereal received only two carloads in 3 years, and Evans Milling did not receive any cars in 15 years, from Belt origins. Of the 1,915 cars of corn originating on the Belt in the first 6 months of 1957, 1,326 cars, reflecting 70 percent

of the total, were destined to Kankakee, Indianapolis, Paris, and Danville, and 548 to Chicago. Practically all, if not all, the 1,326 cars consisted of "free" corn on which the proposed rate would apply, while to Chicago, 31 cars were of "free" corn taking the proposed rate, and 517 were Commodity Credit Corporation corn to which the proposed rate would not apply. From the Belt origins to Chicago, the "free" corn movement aggregated 270 carloads in the 12-month period ended October 31, 1956, and 45 cars in the same period a year later.

According to General Foods, the proposed rate has enabled rail buyers to bid for corn in the country market in competition with river buyers, but a difference in the price [fol. 27] which would be offered to the farmer still exists in favor of the river sub-terminal elevators. It computes differences of 0.28 and .63 cents a bushel before and after the effectiveness of the proposed rate, respectively. To determine the prices which could be offered to the farmer at the river elevator at Morris, Ill., and at the country elevator at Blair, Ill., it used a Chicago market price of $1.15 a bushel, from which it subtracted costs of 14.32 cents[6] a bushel on rail originations prior to the proposed rate leaving $1.0068 a bushel as the amount which could be offered to the farmer at the country elevator; 5.67 cents[7] a bushel on rail originations since the effectiveness of the proposed rate leaving $1.0933 a bushel as the amount which could be offered to the farmer at the country elevator; and 5.04 cents[8] a bushel on river originations leaving $1.0996 a bushel as the amount which could be offered to the farmer at the river elevator.

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[6] Reflects the proportional rail rate from Blair to Chicago of 20.5 cents and 3 percent tax converted to 11.82 cents a bushel plus country elevator handling of 2.5 cents a bushel.

[7] Reflects the proposed rate from Blair to Kankakee of 5.5 cents and 3 percent federal tax converted to 3.17 cents a bushel, plus country elevator handling of 2.5 cents a bushel.

[8] Reflects the barge rate from Morris to Chicago of 4.4 cents and 3 percent federal tax converted to 2.54 cents a bushel, plus elevation at river of 1.5 cents a bushel (2.68 cents per 100 pounds) and country elevator mark-up of 1 cent a bushel.

Based on the actual daily bids at five Belt points and five river points during the 7-month period ended July 31, 1957, the Belt bids averaged 2.02 cents a bushel higher than the river bids. The belt bids, however, were f.o.b. rail car, after elevation; while the river bids were f.o.b. trucks, prior to elevation into barges. By adjusting the bids to a similar basis for comparison, the river bids are seen to be higher on the average than the rail bids.

[fol. 28] The record indicates that the use of different moisture discount scales brings about different levels in bids, thus complicating the price picture and making it difficult to determine what the ultimate price paid will be under each scale. General Food's bids were on moisture discounts of 1 cent a bushel for each .5 percent of moisture ranging from 15.5 to 23 percent. There is testimony to the effect that 3 other scales are in use at Chicago and other markets, but there is no evidence that the river and Belt bids actually compared were on different scales so as to require any adjustment.

The cost of trucking from farm to river elevator on barge movements offsets the cost of trucking from farm to Belt elevator on rail movements. It is borne by the farmer in either case. If he were located equidistant from a river elevator and a Belt elevator, he could truck to either at equal cost. The same would hold true for a country elevator operator trucking corn which previously had moved from the farms to his elevator. The protestants contend that it costs more to truck corn from the farm to the river than to the Belt because river elevators are up to 40 miles from the farms and for-hire trucks are usually employed, while country elevators are generally within 6 miles of the farms, and farmer owned transportation facilities are used. The logic of this contention is elusive. From the midway point the cost of getting the corn to the river or to the Belt would be the same whether the shipper, be the farmer or elevator operator, hired or furnished his transportation. From points north or south of the midway position shippers would enjoy offsetting geographical advantages as to movement toward the river and the Belt, respectively.

[fol. 29] Cargill, Illinois Grain, and Glidden compare barge shipper costs of 18.5,[9] 17.7,[10] and 18 cents[11] per 100 pounds respectively, with the proposed rate of 5.5 cents, and assert that these barge costs make no provision for insurance, shipper preference for country run unmixed corn, and the usual water carrier disabilities such as weather conditions and added handling. This comparison is not valid in that barge-shipper costs are inflated, at least to the extent that they include cost of trucking to and elevation at the river. The more valid comparison is that of the bids, properly adjusted as previously herein described. The bids are predicated on the market price at Chicago, the purchaser's requirements, and the cost of transportation to Chicago from the points where the bid is made.

The Board of Trade of the City of Chicago, though contending that the proposed rate is too low, expresses doubt that an inbound rail proportional of 18 cents based upon the [fol. 30] barge movement costs to the shipper is submitted by the river elevator, would enable applicants to meet the barge competition. Since price is a controlling factor in the shipper selection of the transportation mode, it believes that an equitable basis would be one predicated upon the pricing of the corn at the river elevator and on the Belt. Based upon the average difference of 2 cents a bushel in the rail corn bid on the Belt over the barge corn bid at the river and the trucking charges ranging from 2 to 4 cents a bushel from country elevators to river elevators, the proposed inbound proportional, according to the Chicago

[9] Includes trucking from Missal, Ill., country elevator to Ottawa, Ill., river elevator of 5.36 cents, transfer truck to barge of 2.68 cents, barge rate Ottawa to Chicago of 4.95 cents, stevedoring at Chicago of 1.15 cents, transfer barge to rail at Chicago of 4.01 cents, and outbound inspection of .45 cents.

[10] Includes trucking from Dwight, Ill., country elevator to Morris, Ill., river elevator of 5.4 cents, transfer truck to barge of 2.7 cents, barge rate Morris to Chicago of 4.4 cents, and stevedoring and transfer barge to rail at Chicago of 5.2 cents.

[11] Includes nominal trucking from country elevator to Seneca, Ill., river elevator of 3 cents a bushel, transfer truck to barge of 1.5 cents a bushel, barge rate Seneca to Chicago of 2.63 cents a bushel, stevedoring at Chicago of .75 cents a bushel, and transfer barge to rail at Chicago of 2.25 cents a bushel, a total of 10.13 cents a bushel or 18 cents per 100 pounds.

Board of Trade, would be lower than competitively necessary from Belt points in the 2, 2.5, 3, 3.5, and 4 cents a bushel trucking zones by amounts of 7, 8, 9, 10, and 10.5 cents per 100 pounds, respectively. By subtracting these amounts from the Belt bids, and trucking charges from the river bids, the belt and river average bids for the 7-month period ended July 31, 1957, would be approximately the same, differing only from .02 to .2 cents a bushel. Increases, from 7 to 10.5 cents depending upon the trucking zone, would produce inbound proportional rates ranging from 12.5 to 16 cents. The 12.5-cent rate so adjusted would apply from Belt points nearest the river and most affected by barge competition, but most distant to Kankakee, and the 16-cent adjusted rate would apply from points most distant to the river and least affected by the competition, but nearest to Kankakee. Both the simple average of 46.4 miles and weighted average distance of 38.3 miles based upon the corn movements on the Belt during the first 6 months of 1957, from the Belt points to Kankakee, are in the 3 cents a bushel trucking zone. The adjusted rate from Belt points in that zone would be 14.5 cents, and the Chicago Board of Trade [fol. 31] is of the opinion that the Belt points should be blanketed with this rate because the points are so treated now, and the river prices at the most competitive river elevators, Spring Valley to Morris, are blanketed. This elaborate Chicago Board of Trade proposal is defective in that it begins with the erroneous premise that the Belt bids during the comparison period were higher than river bids, when, in fact, they were not, since they applied to corn at different levels in the transportation chain. Moreover, it contemplates a situation in which shippers by barge can favorably compete with shippers by rail at points on the Belt and permits the railroad to enjoy its geographical advantage only as to corn grown south of the Belt.

Applicants submitted no cost data, but rely on comparative earnings, rate levels, and operating conditions as indicative of the compensativeness of the proposed rate.

During the 8 month period ended August 31, 1957, the corn and corn products movement of General Foods yielded average revenues of $66.07 per car, 110,076 pounds, and $1.685 per car-mile for 39.21 miles, from Belt origins to Kankakee; $403.33 per car, 81,775 pounds, and 47.7 cents

per car-mile for 845.7 miles, from Kankakee to eastern destinations; and $448.42 per car and 50.69 cents per car-mile for 884.7 miles, from Belt origins to eastern destinations. In the same period, the movement of Evans Milling yielded average revenues of $59.42 per car, 109,137 pounds, and $2.38 per car-mile for 24.95 miles, from Belt origins to Kankakee; and $407.38 per car, and 61.62 cents per car-mile, from Belt origins to eastern destinations, including Ohio, via Kankakee and Indianapolis. The proposed rates did not [fol. 32] apply to Ohio destinations during the period, and excluding such shipments, the car-mile earnings averaged 51.09 cents. For 1955, the average revenues of the New York Central were 40.015 cents per car-mile for its average haul of 236.58 miles. Between 1948 and 1956, inclusive, the average railroad revenue from corn ranged from 73 to 95 cents per short-line car-mile. On the products of agriculture earnings ranged from 42 to 48 cents and on selected grain and grain products (including corn and corn products) 57 to 71 cents. Distances on which the study producing these figures was based were not shown. Actual distances would produce lower earnings, but in many instances actual mileages are close to short-line mileages.

The proposed combinations from Belt origins to 18 representative destinations via Kankakee, and the reshipping rates from Chicago to eastern destinations, reflect averages of 14.4 and 13.1 percent, respectively, of the Docket 28300 first-class rates. On ex-lake grain, from Buffalo and Oswego, N. Y., and Erie, Pa., to tidewater ports, applicants maintain export proportional rates which range from 6.3 to 9.5 percent of the same first-class rates. Also, from certain Belt origins to New York City and Boston, Mass., applicants maintain export rates on grain which are lower than the combination of proportionals over Kankakee. For example, from Dwight, the combination domestic rates are 59.5 and 61.5 cents to New York City and Boston, respectively, and the export rate is 54.5 cents to both ports.

The operating distance of the New York Central from Chicago to Kankakee is 75 miles compared with the weighted average distance of 38.3 miles from Belt points to Kan- [fol. 33] kakee. The aggregate distances from Belt to Kankakee, via truck to the river, thence barge to Chicago, and

thence the New York Central to Kankakee exceeded by 133 to 797 percent the distance from Belt points to Kankakee, and to certain eastern destinations. The distances from Chicago via Kankakee exceeded by 3.73 to 20.61 percent the distances from Belt points via Kankakee. The line of another carrier Illinois Central Railroad, from Chicago to Kankakee is more direct than that of the New York Central. The proposed rates apply from Belt points to eastern destinations via either Kankakee or Chicago.

The switching of loaded and empty grain cars from and to terminal elevators at Chicago for the transportation of corn to Kankakee, Indianapolis, Paris, and Danville by the New York Central is more complex than its handling of cars at Belt origins for movement to the same destinations. Switching charges absorbed by the New York Central on corn from Chicago to Kankakee during 2 months in 1956 averaged about 2 cents per 100 pounds. Avoidance of this cost item and the shorter weighted average distance from Belt points as compared to the distance from Chicago to Kankakee support the New York Central's contention that handling corn from the Belt points is less expensive than from Chicago. Further support lies in the fact that no additional trains or power units were needed to handle the increased corn traffic from the Belt points, since the regular trains drop off the empties when westbound and pick up the loaded cars when eastbound. The exact extent to which handling is less expensive on the Belt than at Chicago is not shown.

[fol. 34] The New York Central, for its haul from Chicago to Kankakee, assesses the local rate, but upon transit it is credited to the Chicago reshipping rate applicable via Kankakee, out of which it was required to absorb switching charges. At the proposed rate, it receives after transit the full amount of the proposed inbound proportional rate of 5.5 cents for its haul from Belt origins to Kankakee, and avoids the Chicago switching absorption. Thus by handling traffic at the proposed rate its revenues are increased by 7.5 cents per 100 pounds over its previous handling, and its expenses are reduced in accordance with the reduction in

miles from the 75 between Chicago and Kankakee to the lesser weighted average distance of 38.3 miles from Belt points to Kankakee.

The protestants submitted a study of the system average costs[12] of the New York Central and the territorial average costs[13] of the eastern district railroads. On the average 55-ton load, the out-of-pocket costs of the New York Central and the eastern district railroads are 8.56 and 8.57 cents per 100 pounds, respectively, for the weighted average distance of 38.3 miles. On minimum loads of 50-tons and for the simple average distance of 46.4 miles, the out-of-pocket costs range up to 9.66 cents per 100 pounds.

This study is intended to show the proposed proportional rates to Kankakee non-compensatory. It fails in this pur- [fol. 35] pose, primarily because it deals only with the inbound proportional. That rate factor has no independent existence, but is an integral part of the rate which applies on the through transportation from Belt origin, through the milling-in-transit point, to delivery of the corn product at its ultimate destination. Moreover, it is only by application of the through combination that the fourth-section departures subject of this proceeding are created.

Applicants point out that, since rates from each origin to each ultimate destination could be filed as single factor rates (and be no more compensatory than under the present publication), condemnation based on finding the inbound proportional only to be non-compensatory would be tantamount to condemnation arising out of the method of publication.

The authorities cited by the protestants in support of their contention that the issue here concerns a separate component of through rates from the future the lawfullness of which may be passed on independently of the other com-

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[12] Based upon an application of cost formula Rail Form A of the Commission's Sections of Cost Finding.

[13] From our cost Finding Section Statement No. 1-57 applying Rail Form A to expenses of the eastern district railroads, adjusted to reflect current levels.

ponents, are not helpful here. *Great Northern Ry.* v. *Sullivan*, 294 *U.S.* 458, was a Section 1 case holding that the through rate must be shown to be unreasonable in order to support a reparation award. *Atchison, T. & S. F. Ry. Co.* v. *United States*, 279 U.S. 768, condemned a railroad's attempt to increase a local rate to a transit point after the traffic was shipped out of that point by another railroad. *Cairo Board of Trade* v. *Cleveland, C. C. & St. L. Ry. Co.*, 43 I.C.C. 343, so far as is pertinent, concerned a grain rail center which was unduly prejudiced by the failure of the railroads to accord it reshipping rates comparable to those enjoyed by competitive rail centers. Somewhat similar thereto is *Atlanta Terra Cotta Co.* v. *Atlanta & W. P. R. Co.*, 151 I.C.C. 45.

[fol. 36] For 1956, Mechling's operating ratio was 91.9 percent, and its average fully distributed costs for the transportation of corn from the six most competitive ports to Chicago was 11.4 mills and 87.93 cents per ton or 4.4 cents per 100 pounds. These expenses are about 10 cents less than the New York Central's average fully distributed costs of 14.33 and 13.57 per 100 pounds on 50-ton and 55-ton loads, respectively, for 46.4 miles, computed by protestants. According to Mechling this difference of approximately 10 cents represents its inherent low cost advantage which must be preserved. The barge carrier is not entitled under the act to have its rates protected from a competing mode of transportation, where, as in this instance, the railroad's efforts to secure traffic do not amount to a destructive competitive practice.

The Chicago Board of Trade and others raise certain issues, principally discrimination against whole corn by the milling-in-transit limitation; discrimination against Chicago by the proposed-rate combination applying over Kankakee when prior thereto rates to the East were made over Chicago; undue preference to the processors of corn by the limitations in the application of the proposed rate to commodities shipped by these processors; and unreasonable routes on the proposed rate combination by the restrictive routes which apply over Kankakee in movements to eastern destinations. Although the New York Central intends to

remove the milling-in-transit limitation, these issues do not directly deal with the fourth-section principles here involved, but are properly matters which may be raised in investigation or complaint proceedings. However, since the proposed rates are effective over Chicago, that point has [fol. 37] the same stature as all other corn processing points in official territory in their application. Moreover, the routes over Kankakee are the same as they were for many years prior to the establishment of the proposed rates, and while limited in their scope as compared to making the inbound rate break on Chicago, there is no indication of undue damage to Chicago.

It is clear that the competitive situation which prevailed prior to the proposed rate between the all-rail and the barge-rail rates on corn from the northern Illinois territory to the East required an adjustment in the all-rail rates, and that such an adjustment requires fourth-section relief. The proposed rates are intended partly to remedy the situation, and the instant application seeks the relief to cover the departures which occur. Before such relief may be granted, applicants must show that the proposed rates are reasonably compensatory and no lower than necessary to meet the competition.

The country elevators in the area were originally set up to do business over all-rail routes, and yet, prior to the proposed rate, the preponderant portion of their business was over barge-rail routes. Except for the handling of government-controlled corn shipped at export rates (which are lower than those in issue), these elevators were relegated, for the most part, to such operation as was necessary to process corn for retail locally, while the elevator operators took on the function of merchandisers employed at taking the corn off the farmer's hands and marketing it at the river. After the proposed rate went into effect, this pattern was changed. Elevators on the Belt discontinued their merchandising business with the sub-terminal river elevators and returned to their former role as rail elevators. Of the [fol. 38] elevators closer to the belt than the river, but which had no facilities on the New York Central, some set up portable equipment on the Belt, while others experienced

reductions and face possible elimination of their business in corn for river shipment. This is to be expected in making the all-rail route competitive with the barge-rail route.

Some diversion of traffic must necessarily result in redeveloping a rail movement of corn from the area contiguous to the rail line, and to that extent the barge movement and the business of those connected therewith will be adversely affected. An example of how the competitive situation was altered is seen in the case of the country elevator at Grand Ridge, Ill., which lost some business from farms located between it and the Belt elevator at Streator, 8 miles to the south, but lost no business from farms lying between it and the river elevator at Ottawa, 8 miles to the north. Another country elevator operator at Marsailles, Ill., north of the river, felt no adverse effects from the operation of the proposed rates, notwithstanding that his area of business extends south of the river to within 6 miles of the Belt. Even though he lost some customers, he gained others. It is interesting to note that though this operator was located on the Rock Island, he had no facilities for rail loading because, as he related, there is no incentive to ship by rail, the river rate being what it is.

At the same time the 10 competitive river ports, notwithstanding their loss of traffic to the Belt, increased their shipments of corn to Chicago from 402,105 tons in the period December 15, 1955, to August 30, 1956, to 493,668 tons in the corresponding period the following year during which [fol. 39] time the proposed rates were in effect. It is apparent that while corn grown adjacent to the Belt was attracted to the rails, that grown adjacent to the river remained with the barges. Thus it is evident that the proposed rates are not lower than necessary to meet the barge competition.

The rate and revenue comparisons and cost-saving evidence submitted by the New York Central and its supporters establish the compensativeness of the proposed rates.

We find, upon the record herein, that applicants have shown a special case within the meaning of Section 4 of the act, by virtue of actual and compelling competition; that

the proposed rates are not lower than necessary to meet that competition, do not constitute a destructive competitive practice, are reasonably compensatory, and will not impose an undue burden on other traffic; and that the relief sought would not be disharmonious with the other provisions of the act, would be in the public interest, and is justified.

A fourth-section order granting the relief sought will be entered.

[fol. 40]

Fourth Section Order No. 19346

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, held at its office in Washington, D. C., on the 8th day of June, A. D. 1960.

CORN AND CORN PRODUCTS, ILLINOIS TO OFFICIAL TERRITORY

By fourth-section application No. 33955, as amended, carriers parties to the New York Central Railroad Company tariff I. C. C. No. 1169 and Agent H. R. Hinsch's tariff I. C. C. Nos. 4403 and 4499, according as they may participate in the traffic, apply for authority to continue or to establish and maintain the rates hereinafter described without observing the long-and-short-haul provision of Section 4 of the Interstate Commerce Act. A hearing having been held, and full investigation of the matters and things involved in said application having been made, and the division, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which application and report are hereby referred to and made a part hereof:

It is ordered, That applicants in No. 33955, as amended, be, and they are hereby, authorized to continue or to establish and maintain over their proposed direct routes, for the transportation of corn products, in carloads, as more fully described in the application, from points in Illinois on that part of the New York Central Railroad Company's Kan-

kakee Belt Line extending from Van's Siding to Moronts, both inclusive, to points in central, trunk-line, and New England territories, rates constructed on the basis described in the application, and to maintain higher rates from and to intermediate points; *Provided*, That the rates from and to such higher-rated intermediate points shall not be increased except as may be authorized by this Commission nor exceed the lowest combination of rates subject to the Interstate Commerce Act.

It is further ordered, That all other and further relief prayed by fourth-section application No. 33955, as amended, be, and it is hereby, denied.

The commission does not hereby approve any rates filed under this authority, all such rates being subject to complaint, investigation, and correction if in conflict with any provision of the Interstate Commerce Act.

By the Commission, division 2.

HAROLD D. McCOY,
Secretary.

(SEAL)

[fol. 41]

EXHIBIT II TO COMPLAINT

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 18th day of November, A.D. 1960.

FOURTH SECTION APPLICATION NO. 33955

CORN AND CORN PRODUCTS, ILLINOIS TO OFFICIAL TERRITORY

Upon consideration of the record in the above-entitled proceeding, petitions, filed July 18, 1960, of protestants for reconsideration of the report of Division 2, decided June 8, 1960, and for further oral argument before the full Commission and replies thereto by applicants and intervenors in support of applicants, filed September 26, 1960;

It is ordered, That the petitions be, and they are hereby, denied for the reason that the matters submitted in support thereof do not constitute substantial and material grounds to warrant reopening of this proceeding for reconsideration and reargument.

By the Commission.

HAROLD D. McCOY,
Secretary.

(SEAL)

[fol. 42]

EXHIBIT III TO COMPLAINT

INTERSTATE COMMERCE COMMISSION

FOURTH SECTION APPLICATION NO. 33955 CORN AND CORN PRODUCTS, ILLINOIS TO OFFICIAL TERRITORY

Decided .....

Authority to establish and maintain an all-rail proportional rate on corn and corn products to Kankakee, Ill., from origins on the line of the New York Central Railroad Company, Moronts to Van's Siding, Ill., inclusive, without observing the long-and-short-haul provision of section 4 of the Interstate Commerce Act, denied.

Richard J. Murphy, William C. Leiper, and *Daniel J. Sweeney* for applicants.

Freeman Bradford and *A. C. Shier* for interveners in support of the application.

Edward B. Hayes, Wilbur S. Legge, Nuel D. Belnap, Harold E. Spencer, Richard J. Hardy, Richard M. Freeman, James V. Springrose, Lawrence Farlow, James C. Scott, I. M. Funk, Ronald E. Tallyn, E. S. Herron, R. D. Erickson, and *J. S. Chartrand* for protestants.

REPORT PROPOSED BY GEORGE A. DAHAN, HEARING EXAMINER

By application, as amended, railroads parties to New York Central Railroad Company's tariff I.C.C. No. 1169 and Agent H. R. Hinsch's tariffs I.C.C. Nos. 4403 and 4499, apply for authority to establish and maintain an all-rail

proportional rate of 5.5 cents,[1] on corn and corn products, minimum 100,000 pounds, from northern Illinois origins on that part of New York Central's Kankakee Belt Line extending eastward from Moronts to Van's Siding, Ill., to Kankakee, Ill., applicable only on milled-in-transit traffic destined ultimately to points in central, trunk line, and New England territories at present proportional or reshipping rates from Kankakee to final destination, without observing the long-and-short-haul provision of the Interstate Commerce Act.

[fol. 43] Effective December 15, 1956, the New York Central established over its line direct a proportional rate of 5 cents (subsequently increased to 5.5 cents under Ex Parte 206), on corn and corn products, minimum 100,000 pounds, from the Kankakee Belt origins to Kankakee, restricted to apply on traffic milled-in-transit destined to points at the western termini of eastern trunk lines and points east thereof. At the same time, the through single-factor rates from these origins to final destination were restricted so as not to apply when the combination of the proportional rate to Kankakee and the reshipping rate from Kankakee to final destination is lower. The proportional rate to Kankakee became effective without protest. It was established in the belief that outstanding fourth section orders in connection with the reshipping rates from Kankakee afforded ample relief to cover departures which occurred. Subsequently, applicants learned that restriction of the rate to destinations at the western termini of eastern trunk lines and east thereof created departures at destinations in central territory not authorized by the outstanding orders. Additionally, unauthorized origin departures were also created at Kankakee and other origins north, south, and east thereof, because the combination of proportional rates to and from Kankakee resulted in lower per-car charges than those in connection with the application of the flat or local rates from Kankakee and other intermediate origins. To eliminate the unauthorized destination depar-

[1] Rates are stated in amounts per 100 pounds, include the increase under Ex Parte 206 unless otherwise indicated, and are subject to the increase under Ex Parte 212.

tures, the 5.5-cents proportional rate to Kankakee was extended to apply on the same traffic destined ultimately to [fol. 44] points in central territory effective July 30, 1957, postponed to August 29, 1957. And the instant application was filed for authority to maintain the origin departures resulting from the adjustments effective December 15, 1956 and August 29, 1957. On August 27, 1957, the Commission granted the relief sought temporarily pending final determination of the matter herein. On August 28, 1957, certain protestants brought a court action to set aside the temporary order of the Commission and to enjoin the use of the rates without fourth-section relief. A temporary restraining order was issued on August 28, 1957, making the reduced rate combinations over Kankakee inoperative until November 28, 1957, when the court order was vacated and the court action dismissed. The reduced rate has been in effect since November 28, 1957.

Historically, the rail rates on grain and grain products from northern Illinois to eastern destinations were combination rates over Chicago, Ill., and later when single-factor rates were established they were made equal to the combinations. From 1907 to 1921, the rates on grain products ranged from the same to one cent higher than the rates on grain. Since 1921, the rates on grain products have been uniformly .5-cent higher than those on grain. This differential holds true in respect of the reshipping rates as well as the flat rates. The same reshipping rates apply from both Chicago and Kankakee.

The reduced proportional rate, also herein referred to as the proposed rate, to Kankakee, in connection with the reshipping rates from Kankakee, to eastern destinations, [fol. 45] is to meet the competition of the barge-rail combination rates over Chicago made up of the local barge rates to Chicago and the same rail reshipping rates to eastern destinations. The local barge rates from 10 Illinois River ports[2] to Chicago ranged from 3.5 to 6 cents on December 5, 1957, and effective December 6, 1957, they range from 3.65 to 6.25 cents. There is no milling-in-transit re-

[2] Lockport, Joliet, Morris, Seneca, Ottawa, La Salle, Spring Valley, Hennepin, Henry, and Lacon, Ill.

quirement for the application of the barge-rail combination rates.

In arriving at the original 5-cent proportional rate the weighted average barge rate of 4.625 cents on the barge movement for the period December 16, 1956 to November 11, 1957, from the 10 ports to Chicago was considered as the competitive rate. On the same movement the weighted average barge rate would be 4.825 cents effective December 6, 1957. Including increases under Ex Parte 212, the proportional or proposed rate is 6 cents. This rate has application only in connection with the reshipping rates on grain products insofar as they apply on certain corn products. In the first instance the flat rates on grain from the Kankakee Belt origins to Kankakee and other transit points in official territory is applied on corn. After milling-in-transit at Kankakee or other transit points and reshipment of corn products, the inbound charges are readjusted on the basis of the proportional rate on corn to Kankakee and the reshipping rates on grain products from Kankakee and applied to the outbound movement of corn products. The local rates initially charged to Kankakee or other transit points apply on the weight of the shrinkage or manufacturing loss.

[fol. 46] The Kankakee Belt Line west of Kankakee roughly parallels the Illinois River in northern Illinois. Moronts is on the river about 4 miles from the nearest river port of Spring Valley, Ill., and Van's Siding which is the most distant point from the river is about 32 miles south of its nearest port of Joliet, Ill. The northern Illinois territory produces a surplus of corn. Historically, this corn moved over all-rail routes to eastern destinations. The development of commerce on the Illinois River about 20 years ago started a diversion of the all-rail movement to barge-rail routes extending from river ports to Chicago, Ill., by barge, and thence to eastern destinations by rail. In 1935, 1940, and 1957, respectively, about 1.5, 19, and 59 million bushels of grain, including .7, 16, and 34 million bushels of corn, moved by barge from all Illinois River ports to Chicago. The bulk of the corn movement by barge originates at the 10 river ports which range from 4 to 36

highway miles from the Kankakee Belt origins. The source of the corn are farms ranging up to 40 miles from the ports.

The primary business available to the New York Central at the origin points is grain, predominantly corn, traffic. During 1954, 1955, and 1956, respectively, 467, 729, and 615 carloads of grain, including 305, 533, and 464 carloads of corn originated at the origin points. Most of this rail movement consisted of Commodity Credit Corporation corn[3] which is usually shipped by rail, and is not subject to the same competitive forces as "free" corn.[4] For the 6-, 8-, and [fol. 47] 12-month periods ended June 30, August 31, and December 31, 1957, respectively, 1,915, 2,411, and 2,681 carloads of corn originated at the Kankakee Belt origins.

The 1956 corn crop in the area was somewhat heavier than the 1955 corp. This accounted for a heavier movement in 1957. During the period December 15, 1956 to August 30, 1957, when the reduced rate was in effect the corn movement by barge from the 10 river ports to Chicago amounted to 493,668 tons, including 387,256 tons by protestant A. L. Mechling Lines, Inc.[5] In the corresponding period one year earlier this movement totaled 402,105 tons of which 375,922 tons moved by Mechling. The two ports (Lockport and Joliet) nearest to Chicago are the most distant ports to the Kankakee Belt origins and the barge movement from these ports are not affected by the reduced rate to the same extent as the other ports. Also, from the three ports (Hennepin, Henry and Lacon) south of Moronts the great majority of Mechling's corn business moved to the south in 1956 and to Chicago (north) in 1957. From the five ports primarily affected, Mechling's barge movement to Chicago was lower by 22,928 tons in the period December 15, 1956 to August 28, 1957, than during the corresponding period one year earlier.

Cargill Incorporated, Illinois Grain Corporation, Norris Grain Corporation, W. W. Dewey Company, and Glidden Company, operate sub-terminal elevators at one or more of

[3] Corn under Government control.

[4] Corn available on the open market.

[5] Includes Mechling's wholly-owned subsidiary, Marine Transit Company.

the ports. Cargill's corn purchases at three elevators from the area south of the river dropped from 1,632,092 bushels [fol. 48] in the period December 15, 1955 to August 31, 1956, to 1,171,329 bushels in the corresponding period one year later. From the same area Illinois Grain purchased 854,326 and 365,005 bushels during the first 8 months of 1956 and 1957, respectively. Norris experienced purchase declines in 1957 under 1956 at three elevators. The decline at the one elevator most affected amounted to 646,380 bushels in the first 6 months of 1957 under the first 6 months of 1956. Dewey's purchases from four points in the Kankakee Belt were reduced from 120,000 bushels in the first 8 months of 1956 to 15,000 bushels in the same period of 1957. Glidden's elevators were opened in the fall of 1956. Its limited experience indicates a decline in purchases in the area subsequent to the effectiveness of the proposed rate.

The river sub-terminal elevators are intermediate between the terminal elevators in Chicago and the country elevators in northern Illinois. The sub-terminal elevators are generally operated by the terminal elevators and were established for the accumulation of corn for river movement. With the exception of Dewey which operates both a sub-terminal elevator and a country elevator, this accumulation of corn is through purchase from the country elevators rather than from the farmers. Originally the country elevators sold the corn to merchants or brokers for rail delivery to processors. And their facilities were designed to receive grain from farm wagons and trucks, assemble the grain in carload lots, and load it into rail cars. The advent of river transportation and the establishment of sub-terminal elevators brought about another outlet for the corn gathered [fol. 49] by the country elevators. For its service, the county elevator realizes from 1.5 to 4 cents a bushel. There is little, if any, difference in the country elevator's margin in its sales to buyers for barge or rail movement.

The transportation of corn from the farms to the country elevators is performed in the farmer's own trucks. The corn sold to the river sub-terminal elevators is transported in for-hire trucks either directly from the farms or to a somewhat lesser extent from the country elevators. There

is a small variation in the for-hire truck charge depending upon whether the movements are directly from the farms or from the country elevators. Such charges are based upon distances and are filed and fixed by the Illinois Commerce Commission. They range from 2 to 4 cents a bushel for distances ranging up to 30 miles from elevator to elevator and up to 20 miles from farm to elevator.

The country elevators in a corn producing area base their bids to the farmers on the price at the most advantageous terminal market less transportation costs. Prior to the proposed rate, all the free corn sales of the three supporting country elevators on the Kankakee Belt were made to the sub-terminal river elevators because corn for river transportation commanded higher prices than corn for rail transportation. The higher prices were attributed to the ability of the river sub-terminal elevators to market the corn at lower transportation costs over the barge-rail routes than rail buyers over the all-rail routes. Since the effectiveness of the proposed rates, it became more profitable for these country elevators to ship by railroad and the [fol. 50] farmers benefited by the competitive bidding. Despite their ability to pass on to the farmers the advantage of competitive bids, these country elevators assert that the amount of their business has not increased. Several country elevators with rail facilities from 3 to 11 miles from the Belt have established portable loaders on the Belt.

Of all 11 opposing country elevators, eight are located between the Illinois River and the Kankakee Belt, two are south of the Belt, and one north of the river. The last is on the river and is not served by rail. Although it purchases corn from farmers located as much as 18 miles south of the river or within six miles of the Belt, its business has not been affected by the proposed rate, but its customers south of the river have "been looking toward that rate (proposed rate) pretty strong." The 10 other country elevators are served by rail lines other than the Belt, and have been adversely affected by the proposed rate. The majority have lost business. Most seriously affected was one located at the same point as an elevator served by the Belt. Its business exceeded 250,000 bushels in each of

the years 1955 and 1956, but shipped only 31,000 bushels in 1957[6] and nothing in January 1958. In addition to a decline in business, 1957 under 1956, one of these elevators shipped a portion of its 1957 business through an elevator on the Belt at a cost of over half its commission in such sales. While the total business of one elevator increased 1957 over 1956, its rail shipments declined from 258 car-[fol. 51] loads in 1956 to 78 carloads in 1957, representing a reduction in rail shipments of about 324,000 bushels. And one elevator believed that the proposed rate would be a temporary situation, and to retain its farmer customers it absorbed the difference, amounting to $1,800, between bids on corn in rail cars at competitive Belt elevators and bids in cars at its elevator.

The proposed rate has enabled the Belt elevators to outbid by as much as 4 cents a bushel other elevators in the same area, thus disturbing the prior equitable competitive relationship among the country elevators. On January 30, 1958, the prices bid for corn per bushel were $1.09 in car at Missal, Ill., on the Belt, $1.04⅞ in car at Kernan, Ill., on another railroad, and $1.075 in truck at the river. One Belt elevator has advertised in the local papers of certain points served by other railroads that it has lower freight rates and calls upon the corn producers to seek it for a better price. The opposing country elevators are apprehensive of further inroad of their business as their farmer customers become aware of the higher prices for corn in car on the Belt.

The Farmers Grain Dealers Association of Illinois and the Illinois Grain Dealer's Association, each of which has a membership of approximately 300 country elevators with facilities at about 400 rail stations in Illinois, ask for the restoration of the fair competitive position among their members. It is their position that the rate from one station on one railroad must be competitive with the rate from another station on another railroad, that such rail rates should be competitive with other modes of transportation, and that such fourth-section relief as may be necessary

[6] The effectiveness of the proposed rate was enjoined from August 28, 1957 to November 28, 1957.

[fol. 52] should be granted to enable the railroads to compete with the Illinois River barge lines.

Opposed to any fourth-section relief, is the Indiana Farm Bureau Cooperative Association, a federated cooperative of about 86 associations with a total membership, mostly farmers, of about 160,000. This association is a member of both the Board of Trade of the City of Chicago and the Indianapolis Board of Trade, Inc., and operates a 5.5 million bushel elevator located on the New York Central at Indianapolis, Ind., and a 2.5 million bushel elevator in Louisville, Ky. It handles about 50 million bushels of grain annually, about half of which is corn, including a large part which is marketed in official territory. Among the 150 to 200 Indiana shipping points of its member producers are stations on the New York Central from which the rates on milled-in-transit corn to eastern destinations are as much as 10 cents higher than the combination of the proposed rate and the reshipping rates. Since the eastern market price is the same to both the Indiana and Illinois producers, its members must absorb the difference in transportation costs despite the fact that they are less distant and intermediate to the markets, from the Kankakee Belt. This association has not been too concerned about the barge-rail combination rates.

In its study of the competitive situation, the New York Central made inquiries of corn processors at Kankakee, Paris, and Danville, Ill., and Indianapolis, Ind., as well as country elevators on the Belt. Three of the processors, General Foods Corporation at Kankakee, Illinois Cereal Mills at Paris, and Evans Milling Company at Indian-
[fol. 53] apolis, support the proposed rate. Until the effectiveness of the proposed rate the corn purchases of General Foods in the northern Illinois territory for rail delivery amounted to about 1.5 carloads a week. After the proposed rate became effective, it received 1,101 carloads during the first 8 months of 1957. In the same period, Illinois Cereal and Evans Milling received 327 and 219 carloads, respectively, from Belt origins. Immediately prior to 1957, Illinois Cereal received only two carloads in 3 years, and Evans Milling did not receive any cars in 15 years, from

Belt origins. Of the 1,915 cars of corn which originated in the Belt during the first 6 months of 1957, 1,326 cars, reflecting 70 percent of the total, were destined to Kankakee, Indianapolis, Paris and Danville, and 548 cars were destined to Chicago. Practically all, if not all, the 1,326 cars consisted of free corn on which the proposed rate would apply, whereas only 31 of the 548 cars to Chicago were free corn. The remainder, 517 cars, to Chicago were Commodity Credit Corporation corn on which the proposed rate would have no application. From the Belt origins to Chicago, the free corn movement aggregated 270 carloads in the 12-month period ended October 30, 1956, and 45 cars in the same period a year later.

According to General Foods, the proposed rate has enabled rail buyers to bid for corn in the country market in competition with river buyers, but a difference in the price to the former still exists in favor of the river subterminal elevators. It computes differences of 9.28 and .63 cents a bushel before and after the effectiveness of the proposed rate, respectively. To determine the prices to the farmer at the river elevator at Morris, Ill., and at the [fol. 54] country elevator at Blair, Ill., it used a Chicago market price of $1.15 a bushel, from which it subtracted costs of 14.32 cents[7] a bushel on rail originations prior to the proposed rate leaving a price to the farmer at the country elevator of $1.0068 a bushel; 5.67 cents[8] a bushel on rail originations since the effectiveness of the proposed rate leaving a price to the farmer at the country elevator of $1.0933 a bushel; and 5.04 cents[9] a bushel on river originations leaving a price to the farmer at the river elevator

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[7] Reflects the proportional rail rate from Blair to Chicago of 20.5 cents and 3 percent tax converted to 11.82 cents a bushel plus country elevator handling of 2.5 cents a bushel.

[8] Reflects the proposed rate from Blair to Kankakee of 5.5 cents and 3 percent federal tax converted to 3.17 cents a bushel, plus country elevator handling of 2.5 cents a bushel.

[9] Reflects the barge rate from Morris to Chicago of 4.4 cents and 3 percent federal tax converted to 2.54 cents a bushel, plus elevation at river of 1.5 cents a bushel (2.68 cents per 100 pounds) and country elevator mark-up of 1 cent a bushel.

of $1.0996 a bushel. The difference of .63 cents in favor of barge bids does not appear to be representative. A bid as little as .5-cent higher would succeed. It is doubtful that the Belt elevators would shift their sales from river buyers to General Foods when the bid at the river is .63 higher. Based on the actual daily bids at five Belt points and five river points during the 7-month period ended July 31, 1957, the Belt bids averaged 2.02 cents a bushel higher than the river bids. Although the record indicates that differences in moisture discount scales are reflected by different levels in bids so that the actual price of corn [fol. 55] would be about equal, and that the bids of General Foods and those of the Chicago market were on moisture discounts of 1 and 1.5 cents a bushel, respectively, for each .5 percent of moisture from 15.5 to 23 percent, there is no evidence that the compared actual bids at the river and at the Belt were at different scales so as to require an adjustment in the determination of a difference between such bids. If the actual bids were on such different discount scales, then the difference would favor the Belt by an additional 3 to 4.5 cents a bushel.

[fol. 56] General Foods, as well as the New York Central, would offset the costs of trucking from farm or country elevator to the river elevator on barge movements with trucking from farm to country elevators on rail movements on the grounds that since the farmer bears the trucking costs from farm to either the river sub-terminal elevator or the Belt country elevator, the same expense would be incurred in movements from the farm to equi-distant river elevators and country elevators. But this ignores the movement from country elevator to river elevator of corn which previously moved from farm to country elevator, the relative location of the river elevator which ranges up to 40 miles from the farms and the country elevator which is generally within 6 miles of the farms, the use of for-hire trucks in farm to river elevator movement as contrasted with farmer wagon or truck carriage in farm to country elevator movement, and applicants propose to place shippers on the Belt in a position to compete with the barge lines. The truck charge from the shipper location to the

river is a factor which must be considered. At the same time the trucking directly from farm to river elevator of the major part of the river movements avoids certain private carriage which is of some expense to the farmer and should not be completely ignored.

[fol. 57] Cargill, Illinois Grain, and Glidden, compares barge shipper costs of 18.5,[10] 17.7,[11] and 18 cents[12] per 100 pounds, respectively with the proposed rate of 5.5 cents, and point out that these barge costs make no provision for insurance, shipper preference for country run unmixed corn, and the usual water carrier disabilities, such as dependency on weather and added handling. Since the proposed rate applies in connection with the reshipping rates to the east, the barge costs must include all items necessary to place barge and rail shipments in the same position. In purchases of corn from the country elevator, the river subterminal elevator does not know whether shipment, in whole or in part, will be made from the country elevator or directly from the farm. Its bid to the country elevator is predicated upon shipment from the country elevator. In the circumstances, these river elevators include the trucking expenses from country elevator to river elevator in their comparisons. They exclude expenses for trucking from farm to country elevator, country elevator margin for its service, and inbound inspection, which are the same in [fol. 58] both barge and rail shipments. In respect of the

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[10] Includes trucking from Missal, Ill., country elevator to Ottawa, Ill., river elevator of 5.36 cents, transfer truck to barge of 2.68 cents, barge rate Ottawa to Chicago of 4.95 cents, stevedoring at Chicago of 1.15 cents, transfer barge to rail at Chicago of 4.01 cents, and outbound inspection of .45 cents.

[11] Includes trucking from Dwight, Ill., country elevator to Morris, Ill., river elevator of 5.4 cents, transfer truck to barge of 2.7 cents, barge rate Morris to Chicago of 4.4 cents, and stevedoring and transfer barge to rail at Chicago of 5.2 cents.

[12] Includes nominal trucking from country elevator to Seneca, Ill., river elevator of 3 cents a bushel, transfer truck to barge of 1.5 cents a bushel, barge rate Seneca to Chicago of 2.63 cents a bushel, stevedoring at Chicago of .75 cents a bushel, and transfer barge to rail at Chicago of 2.25 cents a bushel, a total of 10.13 cents a bushel of 18 cents per .100 pounds.

country elevator margin, their view coincides with the evidence of the country elevators as contrasted with the comparison of General Foods which appears to understate the country elevator mark-up on barge shipments. To place a barge shipment in the same position as a rail shipment at the proposed rate, the shipper incurs expenses for the services of elevation or transfer from truck to barge and from barge to rail, trimming or stevedoring, and outbound inspection, which services are not required in rail shipment. A so-called trimming in the loading of a rail car is a part of the usual loading operation and entirely different than the trimming or stevedoring a barge. Nor may the fact that Evans Milling purchased about 25 percent of its corn from an Indianapolis terminal elevator, thus requiring an intermediate elevation, be considered as comparable to the elevation or transfer from barge to rail which is necessary on all barge corn to Chicago.

The Board of Trade of the City of Chicago is of the opinion that the proposed rate is too low, and it seriously doubts that a rate of 18 cents based upon barge movement costs to the shipper submitted by the river elevators, would enable applicants to meet the barge competition. Its knowledge of the respective barge and rail services costs to the shipper is limited. But since the price is a controlling factor in the shipper selection of the transportation mode, it believes that an equitable basis would be one predicated upon the pricing of the corn at the river elevator and on the Belt. Based upon the average difference of 2 cents [fol. 59] a bushel in the rail corn bid on the Belt over the barge corn bid at the river and the trucking charges ranging from 2 to 4 cents a bushel from country elevators to river elevators, the proposed rate, according to the Chicago Board of Trade, would be lower than necessary to meet barge competition by amounts of 7, 8, 9, 10, and 10.5 cents per 100 pounds from Belt points in the 2, 2.5, 3, 3.5, and 4 cents a bushel trucking zones, respectively. The Belt and river average bids for the 7-month period ended July 31, 1957, would be approximately the same, differing only from .02 to .2 cents a bushel, by subtracting the amounts believed necessary to meet barge competition from the Belt bids

and the trucking charges from the river bids. The proposed rate adjusted by increases, from 7 to 10.5 cents depending upon the trucking zone would produce rates ranging from 12.5 to 16 cents; the 12.5-cent adjusted rate would apply from Belt points nearest the river and most affected by barge competition, but most distant to Kankakee, and the 16-cent adjusted rate would apply from points most distant to the river and least affected by the competition, but nearest to Kankakee. Both the simple average of 46.4 miles and weighted average distance of 38.3 miles based upon the corn movement on the Belt during the first 6 months of 1957, from the Belt points to Kankakee, are in the 3 cents a bushel trucking zone. The adjusted rate from Belt points in that zone is 14.5 cents, and the Chicago Board of Trade is of the opinion that the Belt points should be blanketed with this rate because the points are so treated now, and [fol. 60] the river prices at the most competitive river elevators, Spring Valley to Morris, are blanketed.

Applicants submitted no cost data, and the New York Central relies on certain comparative earnings, rate levels, and operating conditions as indicative of the compensativeness of the proposed rate. Based upon the minimum weight and the weighted average distance of 38.3 miles, the proposed rate would yield $55 per car, $1.436 per car-mile, and 2817 mills per ton-mile. These earnings are compared with earnings of $60 per car, $1.017 per car-mile, and 20.3 mills per ton-mile which would be produced by a rail rate on corn, minimum 100,000 pounds, from Winsted, Minn., to Port Cargill, Minn., 59 miles. The compared rate, however, is an intrastate rate schedule to expire on December 5, 1958, and the local interstate rate is higher.

During the 8 months period ended August 31, 1957, the corn and corn products movement of General Foods yielded average revenues of $66.07 per car, 110,076 pounds, and $1.685 per car-mile for 39.21 miles, from Belt origins to Kankakee; $403.33 per car, 81,775 pounds, and 47.7 cents per car-mile for 845.7 miles, from Kankakee to eastern destinations; and $448.42 per car and 50.69 cents per car-mile for 884.7 miles, from Belt origins to eastern destinations. In the same period, the movement of Evans Milling yielded average revenues of $59.42 per car, 109,137 pounds,

and $2.38 per car-mile for 24.95 miles, from Belt origins to Kankakee; and $407.38 per car, and 61.62 cents per car-mile from Belt origins to eastern destinations, including Ohio, via Kankakee and Indianapolis. The proposed rates in connection with the reshipping rates did not apply to [fol. 61] Ohio destinations during the period, and excluding such shipments, the car-mile earnings averaged 51.09 cents. For 1955, the average revenues of the New York Central were 40.015 cents per car-mile for its average have of 236.58 miles. In 1956, the average railroad revenue from corn was 95 cents per short-line car-mile. Actual distances would produce lower earnings, but in many instances actual mileages are very close to short-line mileages.

The combination of the proposed rate and the reshipping rates from Belt origins to eastern destinations via Kankakee, and the same reshipping rates from Chicago to eastern destinations, reflect averages of 14.4 and 13.1 percent, respectively, of the Docket 28300 first-class. On ex-lake grain, from Buffalo and Oswego, N. Y., and Erie, Pa., to tidewater ports, applicants maintain export proportional rates which range from 6.3 to 9.5 percent of the Docket 28300 first-class. Also, from certain Belt origins to New York City and Boston, Mass., applicants maintain export rates on grain which are lower than the combination of proportionals over Kankakee. For example, from Dwight, the combination rates are 59.5 and 61.5 cents to New York City and Boston, respectively, and the export rate is 54.5 cents to both ports. The proposed rate at issue however is a short-haul gathering rate on domestic traffic.

The operating distance of the New York Central from Chicago to Kankakee is 75 miles compared with the weighted average distance of 38.3 miles from Belt points to Kankakee. The aggregate distance from Belt points to Kankakee, via truck to the river, thence barge to Chicago, [fol. 62] and thence the New York Central to Kankakee exceeded by 133 to 797 percent the distance from Belt points to Kankakee, and to certain eastern destinations. The distances from Chicago via Kankakee exceed by 3.73 to 20.61 percent the distances from Belt points, via Kankakee. The line of another applicant, Illinois Central Railroad, from Chicago to Kankakee is more direct than that of the New

York Central, and the combination of the proposed rate and reshipping rates applied from Belt points to eastern destinations via Kankakee and Chicago.

The switching of loaded and empty grain cars from and to terminal elevators at Chicago for the transportation of corn to Kankakee, Indianapolis, Paris, and Danville by the New York Central is somewhat more complex than its handling of cars at Belt origins for movement to the same destinations. The more complex handling forms the primary basis for the opinion of the New York Central's operating witness that the handling of corn from Belt origins is less expensive than from Chicago. This witness, however, has never made a cost study, and could give no idea as to the extent one handling is more expensive than the other. In addition, no consideration was given to service factors, such as expense of freight agents at Belt origins which is chargeable solely to grain traffic, since grain is the only movement at most of the points.

The New York Central assumes that prior to the proposed rate corn grown on farms adjacent to its lines was trucked to the river, barged to Chicago at which it was purchased by General Foods and shipped over its lines to Kankakee where it was transmitted and the product shipped [fol. 63] to eastern destinations over its lines. For its haul from Chicago to Kankakee the billing rate was assessed which upon transit was credited to the Chicago reshipping rate which applies via Kankakee. And it was required to absorb switching charges averaging 2 cents per 100 pounds at Chicago on corn it transported to Kankakee, Indianapolis, Paris and Danville. At the proposed rate, it receives after transit the amount of the proposed rate, 5.5 cents, for its haul from Belt origins to Kankakee, and avoids the Chicago switching absorption. It asserts that it is benefited in the amount of 7.5 cents per 100 pounds by handling traffic at the proposed rate over its previous handling. The average switching absorption is based upon 312 carloads of corn from Chicago terminal elevators on connecting rail lines to General Foods at Kankakee during April, May and June 1956. A substantial portion of this switching was performed by railroads in which the New York Central has a proprietary interest. Although the New

York Central representative testified that the "majority" of the corn from Chicago to Kankakee was backed by ex-barge billing "because I have looked at those bills," he was unable to further detail the extent of the Chicago to Kankakee movement backed by ex-barge billing. The policy of General Foods is to buy corn with ex-rail billing behind it, if possible, and it purchases Chicago elevator corn only when it cannot meet its requirements with country-run corn. In 1956, Cargill sold General Foods 410,000 bushels of corn from its Chicago elevator and 295,000 bushels off the rail track at Chicago. All this corn has ex-rail billing behind it. [fol. 64] The protestants submitted a study of the system average costs[13] of the New York Central and the territorial average costs[14] of the eastern district railroads. On the average 55-ton load, the out-of-pocket costs of the New York Central and the eastern district railroads are 8.56 and 8.57 cents per 100 pounds, respectively, for the weighted average distance of 38.3 miles. On minimum loads of 50-tons and for the simple average distance of 46.4 miles, the out-of-pocket costs range up to 9.66 cents per 100 pounds. These average costs are refined to reflect identifiable service characteristics of the traffic, viz: Type of car; net weight of load; way train gross ton-mile costs; length of haul; empty return; and a part of the spiral service costs.

The average costs are susceptible to greater refinement, but this is solely within the competence of the New York Central, and there is indication of record that the average costs tend to understate the costs of handling corn traffic on the Belt. On brief, the New York Central contends that the method of applying the cost formula results in a gross overstatement of its costs. To support its contention it readjusts the terminal switching and freight train car costs and arrives at an out-of-pocket costs of 6.9 cents per 100 pounds on 55-ton loads for 38.3 miles. The readjusted

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[13] Based upon the application of cost formula Rail Form A of the Commission's Section of Cost Finding.

[14] From Section of Cost Finding Section Statement No. 1-57 which is based upon the application of Rail Form A to expenses of eastern district railroads as a group, and adjusted to reflect current levels.

terminal switching costs are related to the size of the Belt points based upon Statement 4-54 of the Commission's [fol. 65] Cost Finding Section, and the readjusted freight-train car costs reflect an origin operation of one car day. But Statement 4-54 is not of record, and there is evidence from recent cost studies of the eastern railroads that the cost of handling of grain in the territory is somewhat higher than the territorial average. Even if the readjustment was valid and accepted, the proposed rate would still be somewhat less than the readjusted costs.

For 1956, Mechling's operating ratio was 91.9 percent, and its average fully distributed costs for the transportation of corn from the six most competitive ports to Chicago was 11.4 mills and 87.93 cents per ton or 4.4 cents per 100 pounds. These expenses are about 10 cents less than the New York Central's average fully distributed costs of 14.33 and 13.57 per 100 pounds on 50-ton and 55-ton loads, respectively, for 46.4 miles, computed by protestants. According to Mechling this difference of approximately 10 cents represents its inherent low cost advantage which must be preserved.

The Chicago Board of Trade raises certain issues, principally discrimination against whole corn by the milling-in-transit limitation; discrimination against Chicago by the proposed-rate combination applying over Kankakee when prior thereto rates to the East were made over Chicago; undue preference to the processors of corn by the limitations in the application of the proposed rate to commodities shipped by those processors; and unreasonable routes on the proposed rate combination by the restrictive routes which apply over Kankakee in movements to eastern des- [fol. 66] tinations. Although the New York Central intends to remove the milling-in-transit limitation, these issues do not directly deal with the fourth-section principles here involved, but are properly matters which may be raised in investigation or complaint proceedings. And in view of the conclusions herein, they need not be further considered.

It is clear that the competitive situation which prevailed prior to the proposed rate between the all-rail and the barge-rail rates on corn from the northern Illinois territory to the East required an adjustment in the all-rail rates,

and that such an adjustment requires fourth-section relief. The proposed rate is purportedly aimed to partly remedy the situation, and the instant application seeks the relief to cover the departures which occur. Before such relief may be granted, applicants must show that the proposed rate is reasonably compensatory and no lower than necessary to meet the competition. That they have not done so is crystal clear.

The Indiana Farm Bureau Cooperative has not been concerned with the barge-rail combination rates, and it is reasonable to assume that its attitude toward the proposed-rate combinations would have been the same if those combinations were no lower than the barge-rail combinations. Although the country elevators in the area were originally set up to do business over all-rail routes and prior to the proposed rate the preponderant portion of their business was over barge-rail routes, there existed an equality of competitive opportunity between these elevators. The pro- [fol. 67] posed rate disrupted this competitive equality. After the proposed rate, the Belt elevators discontinued their business with the sub-terminal river elevators and the competitive country elevators incurred substantial losses in, and face an elimination of, their business. This, despite the limitations in the application of the proposed-rate combinations. I do not believe that the business changes would have been so drastic if the proposed-rate combinations were no lower than the barge-rail rate combinations. The river elevators would not have been eliminated from doing business with the Belt elevators, and the competitive country elevators would have been better able to hold on to their farmer customers with little if any, injury to their business with the river elevators. The placing of the all-rail routes on a competitive level with the barge-rail routes would necessarily result in some diversion of traffic, but measured from the extent of the diversion at the proposed rate, it appears that an extension of the proposed basis without a milling-in-transit limitation and with the combination made over Chicago would completely eliminate barge competition. In the final analysis, the higher rail bids for corn and the higher barge shipper costs since the effectiveness of the proposed rate are clear indications

that the proposed rate is lower than necessary to meet the barge competition.

The revenue comparisons and cost saving evidence submitted by the New York Central and its supporters are insufficient to establish the compensativeness of the pro-
[fol. 68] posed rate. This is particularly true in the light of the cost evidence presented by protestants. Although the New York Central contends that the reduced proportional rate is compensatory in of itself and presented some evidence in that respect, it and its supporters take the position that the real issue is whether the combination of the reduced proportional rate and the reshipping rates are compensatory. To support their position they cite, principally, *Lane Company, Inc.* v. *Louisville & Nashville Railroad Co., et al.*, 292 I.C.C. 76, *Board of Railroad Commissioners* v. *Atchison T. & S. F. Ry. Co.*, 34 I.C.C. 111, and *Great Northern Ry. Co.* v. *Commodity Credit Corporation*, 77 Fed. Sup. 780. But these cases are not in point. The first deals with a matter of reparation in which case the through charge must be considered. The second holds that all factors of the through rate must be considered to determine whether fourth-section relief is required. It is appropriate here only insofar as the departures are in connection with both proportional factors, there being no departures in connection with the reduced proportional rate from Moronts to Kankakee. And the third case defines a proportional rate. Here the issue concerns a separate component of through rates for the future; the lawfulness of which may be passed on independently of the other components. *Great Northern Ry.* v. *Sullivan*, 294 I.C.C. 458; *Atchison, T. & S. F. Ry. Co.* v. *United States*, 279 U. S. 768; *Cairo Board of Trade* v. *Cleveland, C. C. & St. L. Ry. Co.*, 46 I.C.C. 343; *Atlantic Terra Cotta Co.* v. *Atlanta & W. P. R. Co.*, 151 I.C.C. 45. In the absence of specific
[fol. 69] costs, the average costs, with understatements, as well as possible overstatements considered, are of sufficient probative value to determine the compensativeness of the proposed rate. The conclusion that the proposed rate will not meet the bare out-of-pocket costs is inescapable.

The Chicago Board of Trade, Farmers Grain Dealers Association, Illinois Grain Dealers Association, and certain opposing country elevators are of the opinion that a

rate of 14.5 cents based upon the corn pricing situation would be reasonable. Cargill, Illinois Grain, and Indiana Farm Bureau Cooperative express the view that a rate not less than 15 cents measured by the transportation costs to the shipper, by the corn pricing situation, and by past barge and Belt rate relationships (the barge rate was from 8 to 10 cents lower than the Belt rate in 1940) can be expected to move substantial quantities of corn on the Belt. Mechling and several opposing elevators suggest as an alternative rate level for the proposed rate a rate no lower than 15.5 cents if the barge and rail modes of transportation are to remain equally competitive and the inherent low cost advantage of water transportation is to be preserved. There is merit to each of these proposals, but there are other issues raised by the Chicago Board of Trade which are not here determined which applicants should consider in any future proposal. Accordingly, the matter of a future proposal will be left to applicants.

The examiner finds that sufficient justification for the relief prayed has not been presented. The application should be denied.

[fol. 70] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

Civil Action No. 61 C 169

[Title omitted]

ANSWER OF THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION—Filed April 10, 1961

The United States of America and the Interstate Commerce Commission, defendants in the above-styled proceeding, for answer to the complaint say:

I.

Admit the allegations of paragraph 1 that the complainants seek to enjoin the orders of the Commission specified

therein pursuant to the designated sections of the United States Code. Deny so much of paragraph 1 which alleges that the order of the Commission, Division 2, entered June [fol. 71] 8, 1960, (Exhibit 1 to complaint, unnumbered page following page 26) constitutes permanent action of the Commission. The defendants aver that the order of June 8, 1960, is a permissive order of indefinite duration subject to modification or vacation by the Commission when it deems necessary. Defendants further aver that whether the assailed rates would be prohibited by section 4 of the Interstate Commerce Act, 49 U.S.C. section 4 is argumentative in nature to which no answer is required.

II.

Admit the allegations of paragraph 2 except that the defendants aver that the allegations thereof do not constitute sufficient basis for a cause of action against the lawful orders of the Commission.

III.

Admit the allegations of paragraph 3 except that the defendants respectfully direct the court's attention to the challenged report of the Commission (Exhibit 1 to the complaint) for a complete and accurate statement regarding the extent of plaintiffs' competition prior to and subsequent to the effective date of the assailed rates. Defendants further aver that the allegation that plaintiffs face destruction and loss of their investments is argumentative in nature to which no answer is required.

IV.

Admit so much of paragraph 4 which alleges that plaintiffs participated in the proceeding before the Commission to the extent indicated therein. Defendants deny the allegation that plaintiffs are "proper plaintiffs by reason of the provisions of 49 U.S.C. section 2323 and 5 U.S.C. section [fol. 72] 1009." Defendants aver that plaintiffs may not maintain this suit for failure to exhaust their administrative remedies.

V.

Admit the allegations of the first sentence of paragraph 5. Defendants aver that the remaining allegations of paragraph 5 are argumentative in nature to which no answer is required. Defendants respectfully direct the attention of the court to the challenged report of the Commission for a complete and accurate statement of the rate situation.

VI.

Deny the allegations of paragraph 6 which contend that Division 2 and the entire Commission erroneously found that the assailed rates were reasonably compensatory pursuant to section 4 of the Interstate Commerce Act, 49 U.S.C. section 4. Defendants aver that the Commission's findings and orders are lawful and valid in all respects. Defendants further aver that the remaining allegations are argumentative in nature to which no answer is required.

VII.

Defendants deny that the finding of the Commission that the proposed rates are not lower than necessary to meet the competition is invalid for any of the reasons alleged in paragraph 7. Defendants aver that the Commission's finding is supported by substantial evidence of record and is lawful in all respects. Defendants further aver that the remaining allegations of paragraph 7 are argumentative in nature which require no answer.

VIII.

Answering the allegations of paragraph 8 defendants deny that the Commission's findings concerning the inher- [fol. 73] ent advantages of plaintiff A. L. Mechling's Barge Lines transportation service are in error for any of the reasons set forth in paragraph 8. Defendants aver that the Commission's findings are supported by substantial evidence of record and are valid and lawful in all respects. Defendants further aver that the remaining allegations of paragraph 8 are argumentative in nature which require no answer.

IX.

Answering the allegations of paragraph 9 the defendants deny that the Commission erred in refusing to permit the plaintiffs to attempt to establish that certain rail divisions were discriminatory in contravention of section 3(4) of the Interstate Commerce Act, 49 U.S.C. section 3(4). Defendants aver that issues arising under section 3(4) of the Interstate Commerce Act do not fall within the scope of this proceeding which arises under section 4 of the Interstate Commerce Act; that the order of the Commission expressly provides "The Commission does not hereby approve any rates filed under this authority, all such rates being subject to complaint, investigation, and correction if in conflict with any provision of the Interstate Commerce Act"; that section 13 of the Interstate Commerce Act, 49 U.S.C. section 13 and the Commission's regulations thereunder provide the appropriate remedy for plaintiffs to raise section 3(4) issues before the Commission. Defendants further aver that in this respect plaintiffs cannot maintain this suit for failure to exhaust their administrative remedies. Further answering paragraph 9, the remaining allegations are argumentative in nature which require no answer.

X.

[fol. 74] Defendants admit the allegations of paragraph 10 that the Commission's examiner heard the witnesses, and that the examiner made the quoted statement in his proposed report. Defendants deny that the Commission erred in granting the application of the rail carriers for relief under the provisions of section 4 of the Interstate Commerce Act. Defendants further aver that the remaining allegations are argumentative in nature which require no answer.

XI.

Defendants deny the allegations of paragraph 11. Defendants aver that any diversion of corn resulting from the lawful competition permitted by the assailed order of the Commission does not constitute any injury legal or otherwise sufficient to institute or maintain this suit.

XII.

Answering the allegations contained in paragraphs 12 and 13, the defendants deny the same. Further answering the complaint the defendants aver that the action of the Commission is valid and lawful in all respects, and the defendants further aver that any injuries which may occur to plaintiffs resulting from the lawful and valid orders of the Commission do not constitute any legal basis for instituting or maintaining this suit, and that plaintiffs have no legal standing upon which to maintain this cause of action.

Except as expressly admitted here, the defendants deny each and all of the allegations in said complaint to the extent that they are inconsistent with the averments of this answer or inconsistent with the assailed orders of the Commission.

[fol. 75] Wherefore, the defendants pray that the complaint be dismissed and that the relief prayed for by the plaintiffs be denied.

Robert W. Ginnane, General Counsel; H. Neil Garson, Associate General Counsel, Interstate Commerce Commission, Washington 25, D. C., Attorneys for the Interstate Commerce Commission.

Lee Loevinger, Assistant Attorney General; John H. D. Wigger, Attorney, Department of Justice, Washington 25, D. C.; Robert Tieken, United States Attorney, Chicago, Illinois, Attorneys for the United States of America.

Certificate of service (omitted in printing).

* * * * * * *

[fol. 78]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

Civil Action No. 61 C 169

[Title omitted]

ANSWER OF THE NEW YORK CENTRAL RAILROAD COMPANY—Filed April 20, 1961

Comes now The New York Central Railroad Company, intervenor as defendant herein, and, in answer to the complaint, states:

First Defense

Plaintiffs cannot maintain this suit for lack of standing to sue.

Second Defense

Plaintiffs may not maintain this suit for failure to exhaust their administrative remedies.

Third Defense

Further answering the complaint but without waiver of [fol. 79] the above defenses, The New York Central Railroad Company

I

Admits the allegations contained in paragraph 1 of the complaint except for the allegation that in the absence of specific authorization by the Interstate Commerce Commission such rates would be prohibited by Section 4 of the Interstate Commerce Act, 49 U.S.C. Sec. 4, and except for the allegation that the orders of the Interstate Commerce Commission are final orders, which allegations are denied.

II

Admits the allegations contained in paragraph 2 of the complaint.

III

Admits that plaintiffs Ira Bookwalter, Cullom Cooperative Grain Company, Charles Treasure, Griswold Grain Company and Mazon Farmers Elevator are elevator operators located in the corn producing area in Northern Illinois but denies all other allegations contained in paragraph 3 of the complaint.

IV

Admits that plaintiffs participated in the proceedings before the Interstate Commerce Commission in its Fourth [fol. 80] Section Application Docket No. 33955 as alleged in paragraph 4 of the complaint but denies that plaintiffs are proper plaintiffs herein for the reason that they have no standing to maintain this suit.

V

Denies the allegations contained in paragraphs 5 through 13 of the complaint.

VI

The New York Central Railroad Company avers that Fourth Section Order No. 19346 which complainants seek to have set aside is a permissive order of the Interstate Commerce Commission authorizing relief from the long and short haul prohibition of Section 4 of the Interstate Commerce Act, 49 U.S.C. Sec. 4, so that the New York Central is enabled to maintain its long established and lawful grain rate structure while providing a much needed service at rates from country elevators in the area served by its line of railroad west of Kankakee, Illinois, which are to some degree competitive with barge rates. The establishment of these competitive rates has benefited the farmers through higher prices for corn as a result of competition between purchasers of corn for barge movement and for rail movement. The competitive rail rates from the stations west of [fol. 81] Kankakee to eastern destinations, which the Commission found to be compensatory and not lower than necessary to meet the actual and compelling competition of the barge-rail routes of plaintiff Mechling and other

barge lines, did not adversely affect the barge movement of corn from the Illinois River Ports competitive with the rail routes from New York Central stations west of Kankakee. The Commission found that the 10 competitive ports "increased their shipments of corn to Chicago from 402,105 tons in the period December 15, 1955, to August 30, 1956 to 493,668 tons in the corresponding period the following year during which time the proposed (assailed) rates were in effect."

VII

The New York Central Railroad Company further avers that the orders and actions of the Interstate Commerce Commission here under attack are valid and lawful in all respects, and denies each and every allegation to the contrary set forth in the complaint, and except as herein expressly admitted, this defendant denies each and all allegations in the complaint.

Wherefore, this defendant, The New York Central Railroad Company, prays that the relief sought in the complaint be denied and that the complaint be dismissed with costs assessed against the plaintiffs.

Richard J. Murphy, Attorney for The New York Central Railroad Company, 1225 LaSalle Street Station, Chicago 5, Illinois.

[fol. 82] Certificate of service (omitted in printing).

[fol. 86]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

Civil Action No. 61 C 169

[Title omitted]

ANSWER OF THE McNABB GRAIN COMPANY, LOSTANT GRAIN COMPANY, MISSAL GRAIN COMPANY, FEDERAL NORTH IOWA GRAIN COMPANY, UNION HILL FARMERS ELEVATOR COMPANY, HERSCHER GRAIN COMPANY, M. P. FERRIS, EDWARD CAHILL, E. G. NIELSEN, ROBERT E. DIEMER, FRANK GIBBONS, ISAAC BARRETT, PRISCILLA FARMERS COOPERATIVE GRAIN COMPANY, AND PAYNE-STOTLER GRAIN COMPANY—Filed April 20, 1961

Come now the McNabb Grain Company and the other parties enumerated above, defendants herein, and file their answer to the complaint. The said defendants:

I

Admit the allegations contained in Paragraphs 1 and 2 of the complaint.

II

Admit that plaintiffs Ira Bookwalter, Cullom Cooperative Grain Company, Charles Treasure, Griswold Grain Company and Mazon Farmers Elevator are elevator operators located in the corn producing area of Northern Illinois but deny all other allegations contained in Paragraph 3 of the complaint.

[fol. 87]

III

Admit the allegations of Paragraph 4 of the complaint.

IV

Deny the allegations of Paragraphs 5 through 13 of the complaint.

V

The McNabb Grain Company and the other defendants named herein, for further answer to the complaint herein, aver that the orders and actions of the Interstate Commerce Commission here under attack are valid and lawful in all respects, and deny each and every allegation to the contrary set forth in the complaint, and, except as herein expressly admitted, these defendants deny each and every allegation of the complaint.

Wherefore, these defendants pray that the relief sought in the complaint be denied, and that the complaint be dismissed at plaintiffs' costs.

Leo P. Day, Attorney for the above-named Defendants, 6202 S. Campbell Avenue, Chicago 29, Illinois.

[fol. 88] Certificate of service (omitted in printing).

[fol. 92]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION
Civil Action No. 61 C 169

A. L. MECHLING BARGE LINES, INC., et al., Plaintiffs,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, et al., Defendants.

INTERVENING COMPLAINT OF BOARD OF TRADE OF THE CITY OF CHICAGO—Filed November 30, 1961

1. This action is brought by the Board of Trade of the City of Chicago, hereinafter sometimes referred to as Board of Trade, under the provisions of 28 U.S.C. §§ 1336, 1398, 2284, and 2321-2325, and 5 U.S.C. § 1009, to enjoin, set aside,

annul and suspend a certain order of the Interstate Commerce Commission, hereinafter called the Commission, entitled Fourth Section Order No. 19346, made and entered June 8, 1960, by the Commission, Division 2, in a proceeding docketed as Fourth Section Application No. 33955 and entitled Corn and Corn Products, Illinois to Official Territory. The report of the Commission entered June 8, 1960, is reported at 310 I.C.C. 437. A copy of the said report and order was attached as Exhibit I to the complaint filed herein [fol. 93] by plaintiff A. L. Mechling Barge Lines, Inc., hereinafter referred to as Mechling, and is made a part hereof by reference. Plaintiff Board of Trade in due course filed with the Commission its petition, dated July 14, 1960, for reconsideration by the entire Commission of the report and order of Division 2, which petition for reconsideration was denied by the Commission's order of November 18, 1960, a copy of which order was attached as Exhibit II to the complaint filed herein by Mechling and which is made a part hereof by reference.

2. Plaintiff Board of Trade is a corporation organized and existing under the laws of the State of Illinois. It has operated a commercial exchange in the City of Chicago for more than 100 years, where its members buy and sell grain, grain products, and various other commodities, including corn and corn products. Its members include dealers in and processors of grain and grain products and other commodities as well as operators of grain elevators and storage warehouses handling whole corn in its natural state. Such members are in competition with dealers, processors and warehousemen in other localities such as Kankakee, Illinois and are affected by rates on whole grain and products of those grains in all parts of the United States and particularly, insofar as this action is concerned, in the rates to the East from points and places located on the line of the New York Central Railroad Company which extends westward from Kankakee to Moronts, Illinois, hereinafter referred to as the Kankakee Belt line.

[fol. 94] 3. Fourth Section Order No. 19346 relieved the rail carriers who were parties to the applicable tariffs from

the operation of the long-and-short-haul clause of section 4 of the Interstate Commerce Act, (49 U.S.C. §4), hereinafter called the Act, and authorized such carriers to maintain rates for the transportation of corn (provided such corn was milled into certain corn products at some point before final destination) from origins on the Kankakee Belt line to destinations in the East which are lower than the rates which such carriers contemporaneously maintain for the transportation of similar commodities from intermediate origins, the shorter hauls being included within the longer hauls. The carriers had applied to the Commission for such relief in Fourth Section Application No. 33955. Plaintiff Board of Trade filed a timely protest against the granting of such relief. A hearing on said application was held from January 29, 1958 to February 4, 1958. Plaintiff Board of Trade actively participated in the hearing as a protestant. Plaintiff Board of Trade also actively opposed the granting of such relief by the filing of a brief and a reply to the exceptions taken by applicants to the proposed report of the Examiner recommending denial of such relief, by participating in oral argument, and by filing a petition for reconsideration of the report and order of Division 2, dated June 8, 1960.

4. Plaintiff Board of Trade adopts the allegations of paragraph 5 of the complaint filed herein by Mechling.

[fol. 95] 5. Plaintiff Board of Trade adopts the allegations of paragraph 6 of the complaint filed herein by Mechling.

6. Plaintiff adopts the allegations of paragraph 7 of the complaint filed herein by Mechling.

7. Prior to establishment of the fourth-section departure rates in question, the rates on corn from all stations on the Kankakee Belt line of the New York Central Railroad to the East were made equal to the local rates to Chicago plus the proportional or reshipping rates from Chicago to destinations in the East. The rates on corn products were made in the same manner except that the proportional or reshipping rates were, without exception, made one-half

cent higher per 100 pounds than the proportional or reshipping rates on corn. This long-established rate adjustment permitted all dealers in, and processors and warehousemen of, corn and corn products in Chicago to compete for business on equal terms with dealers, processors, and warehousemen located at Kankakee, Illinois and various other points.

When the railroads established the special fourth-section departure rates here involved, they limited the application of the rates so that they would not apply on whole corn which was transported from origins on the Kankakee Belt line to the East. The New York Central Railroad which published the reduced proportional rate into Kankakee has failed and refused to make an equal reduction in the rates to Chicago, the unloading port of the alleged barge competition.

[fol. 96] The effect of the failure of the New York Central to publish reduced corn rates to Chicago and the limitation by the railroads of the special fourth-section departure rates to apply only on corn products and not on whole corn discriminates against dealers in, and warehousemen of, whole corn at Chicago by placing them in a position where they cannot compete on an equal basis, as they did for 50 years, for corn originating at Kankakee Belt stations. While processors of corn located at Chicago are able to participate to a limited extent in such rates, they are also discriminated against because they cannot compete for corn originating at stations on the Kankakee Belt line on an equal basis with processors at Kankakee and other points, as they did prior to establishment of the special fourth-section departure rates.

The Board of Trade, therefore, took the position before the Commission, and its evidence clearly showed, that the special fourth-section departure rates resulted in undue prejudice to the Board of Trade and to dealers in, and processors and warehousemen of, grain and grain products at Chicago, in violation of section 3 of the Interstate Commerce Act. A witness for the New York Central Railroad testified before the Commission that the New York Central

would remove the discrimination against whole corn by taking steps as quickly as possible to remove the milling-in-transit limitation. In its report, the Commission noted the intention of the New York Central Railroad to remove the milling-in-transit limitation, but held that the issues [fol. 97] raised by plaintiff Board of Trade did "not deal directly with the fourth-section principles here involved, but are properly matters which may be raised in investigation or complaint proceedings". The Commission, therefore, did not consider or determine the issues raised by Board of Trade under section 3 of the Act.

8. The Commission's Fourth Section Order No. 19346 dated June 8, 1960, is void and unlawful for the following reasons:

(1) The order is capricious, arbitrary, erroneous, and beyond the power of the Commission.

(2) The order is not supported by substantial evidence of record but is contrary to and against the manifest weight of the evidence.

(3) The order is unsupported by findings to show that the Commission has complied with the substantive requirements of law.

(4) The Commission is without power to relieve rail carriers from the operation of the long-and-short-haul provision of section 4 of the Act (49 U.S.C. § 4) if the rates for which such fourth-section relief is granted violate section 3 or some other section of the Act, and such violation is properly put in issue in the proceeding before the Commission to determine whether fourth-section relief should be authorized.

[fol. 98] (5) The Commission erred in holding that it could relieve the rail-carrier applicants from the operation of the long-and-short-haul provision of section 4 of the Act without considering and determining issues raised by plaintiff Board of Trade as to whether the rates for which such relief was sought would violate section 3 of the Act.

(6) The Commission arbitrarily and erroneously failed and refused to consider whether the rates for which the rail-carrier applicants sought fourth-section relief were unduly prejudicial to plaintiff Board of Trade in violation of section 3 of the Act.

(7) The Commission erred in holding that the rail-carrier applicants were not required to show that the inbound proportional rates to Kankakee were compensatory.

(8) The Commission erred in holding that the through combination rates authorized to be established by the order were reasonably compensatory and were no lower than necessary to meet the competition which they were designed to meet.

9. By reason of the unlawful, arbitrary, and capricious action of the Commission in entering its Fourth Section Order No. 19346, dated June 8, 1960, plaintiff Board of Trade has been and will continue to be subjected to irreparable damage if the relief hereinafter prayed for is not granted.

[fol. 99] Wherefore, plaintiff prays:

1. That, pursuant to 28 U.S.C. §§ 1336, 1398, 2284, and 2321-2325, inclusive, there shall be constituted to hear this case a special court of three judges, at least one of whom shall be a circuit judge;

2. That the Court, by interlocutory injunction, enjoin and restrain the operation of Fourth Section Order No. 19346, dated June 8, 1960, pending final hearing and determination of this action;

3. That, upon final hearing of the cause, the Court adjudge that Fourth Section Order No. 19346 is unlawful, void, beyond the power of the Commission, arbitrary, capricious, unsupported by essential findings, and against the manifest weight of the evidence, and that a judgment be entered setting aside, annulling, suspending, and perpetually enjoining the operation of said order;

4. That plaintiff Board of Trade have such other and further relief as may be deemed proper by the Court.

Board of Trade of the City of Chicago by Harold E. Spencer, Richard M. Freeman of Belnap, Spencer, Hardy & Freeman, One North La Salle Street, Chicago 2, Illinois, CEntral 6-0204, Attorneys for Intervening Plaintiff, Board of Trade of the City of Chicago.

[fol. 100] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Civil Action No. 61 C 169

[Title omitted]

ANSWER OF McNABB-GRAIN COMPANY, LOSTANT GRAIN COMPANY, MISSAL GRAIN COMPANY, FEDERAL NORTH IOWA GRAIN COMPANY, UNION MILL FARMERS ELEVATOR COMPANY, HERSCHER GRAIN COMPANY, M. P. FERRIS, EDWARD CAHILL, E. G. NIELSEN, ROBERT N. DIEMER, FRANK GIBBONS, ISAAC BARRETT, PRISCELLA FARMERS COOPERATIVE GRAIN COMPANY and PAYNE-STOTLER GRAIN COMPANY, AS INTERVENING DEFENDANTS, TO INTERVENING COMPLAINT OF THE BOARD OF TRADE OF THE CITY OF CHICAGO—Filed December 27, 1961

Come now the above-named intervening defendants, and for answer to the intervening complaint of the Board of Trade of the City of Chicago, respectfully state:

I

They admit the allegations of paragraphs 1, 2, and 3 of the intervening complaint.

II

They deny the allegations of paragraphs 4, 5, and 6 of the intervening complaint, adopted from paragraphs 5, 6, and 7 [fol. 101] of the complaint filed by Mechling Barge Lines, Inc., in this cause.

III

They deny the allegations of paragraphs 7, 8 and 9 of the intervening complaint.

IV

Further answering the intervening complaint herein, these intervening defendants aver that the orders and actions of the Interstate Commerce Commission here complained of are lawful and valid in all respects, and they deny each and every allegation to the contrary set forth in the intervening complaint and, except as herein expressly admitted, these intervening defendants deny each and every allegation of the said intervening complaint.

Wherefore, the above-named intervening defendants pray that the relief sought in the intervening complaint be dismissed with costs assessed against intervening plaintiffs.

Leo P. Day, Attorney for above-named Intervening Defendants, 6202 S. Campbell Avenue, Chicago 29, Illinois.

Certificate of service (omitted in printing).

[fol. 103] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Civil Action No. 61 C 169

[Title omitted]

ANSWER OF THE NEW YORK CENTRAL RAILROAD COMPANY TO INTERVENING COMPLAINT OF BOARD OF TRADE OF THE CITY OF CHICAGO—Filed December 28, 1961

Comes now The New York Central Railroad Company and in answer to the intervening complaint of Board of Trade of the City of Chicago, states:

First Defense

Intervenor as plaintiff cannot maintain this suit for lack of standing to sue.

Second Defense

Intervenor as plaintiff cannot maintain this suit for failure to exhaust its administrative remedies.

[fol. 104] Third Defense

Further answering the intervening complaint, but without waiver of the above defenses, The New York Central Railroad Company:

I

Admits the allegations contained in paragraphs 1, 2, and 3 of the intervening complaint.

II

Denies the allegations of paragraphs 5 through 7 inclusive of the complaint filed by Mechling Barge Lines, Inc., which are adopted by the intervenor Board of Trade of

the City of Chicago in paragraphs 4 through 6 inclusive of the intervening complaint.

III

Denies the allegations contained in paragraph 7 of the intervening complaint. Paragraph 7 of the intervening complaint is lengthy and argumentative in nature, and therefore is denied in its entirety.

IV

Denies the allegations contained in paragraphs 8 and 9 of the intervening complaint.

V

The New York Central Railroad Company avers that Fourth Section Order No. 19346 which complainants seek to have set aside is a permissive order of the Interstate Commerce Commission authorizing relief from the long and [fol. 105] short haul prohibition of Section 4 of the Interstate Commerce Act, 49 U.S.C. Sec. 4, so that the New York Central is enabled to maintain its long established and lawful grain rate structure while providing a much needed service at rates from country elevators in the area served by its line of railroad west of Kankakee, Illinois, which are to some degree competitive with barge rates. The establishment of these competitive rates has benefited the farmers through higher prices for corn as a result of competition between purchasers of corn for barge movement and for rail movement. The competitive rail rates from the stations west of Kankakee to eastern destinations, which the Commission found to be compensatory and not lower than necessary to meet the actual and compelling competition of the barge-rail routes of plaintiff Mechling and other barge lines, did not adversely affect the barge movement of corn from the Illinois River Ports competitive with the rail routes from New York Central stations west of Kankakee. The Commission found that the 10 competitive ports "increased their shipments of corn to Chicago from 402,105 tons in the period December 15, 1955, to August 30, 1956 to 493,668 tons in the corresponding period the following year

during which time the proposed (assailed) rates were in effect."

[fol. 106] VI

The New York Central Railroad Company further avers that the orders and actions of the Interstate Commerce Commission here under attack are valid and lawful in all respects, and denies each and every allegation to the contrary set forth in the complaint, except as herein expressly admitted, this defendant denies each and all allegations in the complaint.

Wherefore, The New York Central Railroad Company prays that the relief sought in the intervening complaint be denied and that the complaint be dismissed with costs assessed against intervening plaintiffs.

Richard J. Murphy, Attorney for The New York Central Railroad Company, 1225 LaSalle Street Station, Chicago 5, Illinois.

Certificate of service (omitted in printing).

[fol. 108] [File endorsement omitted]

IN THE UNITED STATE DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

Civil Action No. 61 C 169

[Title omitted]

ANSWER OF THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION TO THE INTERVENING COMPLAINT OF THE BOARD OF TRADE OF THE CITY OF CHICAGO—Filed December 28, 1961

The United States of America and the Interstate Commerce Commission, defendants in the above-styled proceeding, for answer to the intervening complaint of the Board of Trade of the City of Chicago, say:

I.

Admit the allegations of paragraph 1.

II.

Admit the allegations of paragraph 2 except that the Court is respectfully referred to the report of the Commission, Division 2, dated June 8, 1960 (original complaint, Exhibit 1) for a complete and accurate statement of the [fol. 109] competitive situation as related to the members of the Board of Trade of the City of Chicago.

III.

Admit the allegations of paragraph 3.

IV.

Answering the allegations of paragraphs 4, 5 and 6, defendants adopt for their answer paragraphs V, VI, and VII of their original answer filed in response to the original complaint by A. L. Mechling Barge Lines, Inc., et al.

V.

Answering the allegations of paragraph 7, defendants aver that the allegations are argumentative in nature which require no answer, and in this respect the Court is referred to the report of the Commission, Division 2, for a complete statement regarding the allegations made before it by the Board of Trade of the City of Chicago. Defendants further aver that the order of the Commission, Division 2, dated June 8, 1960 (original complaint, Exhibit 1) specifically states:

> The Commission does not hereby approve any rates filed under this authority, all such rates being subject to complaint, investigation, and correction if in conflict with any provision of the Interstate Commerce Act.

Defendants further aver that insofar as the intervener's complaint alleges rate discrimination, that intervener has

not exhausted its administrative remedies pursuant to Section 13 of the Interstate Commerce Act, 49 U.S.C. Section 13.

[fol. 110] VI.

Deny each and every allegation of paragraphs 8 and 9.

Further answering the allegations of paragraph 9, the defendants aver that the action of the Commission is valid and lawful in all respects, and that any injuries which may occur to the intervening plaintiff by reason of the lawful and valid orders of the Commission do not constitute any legal basis for maintaining this cause of action.

Except as expressly admitted here, the defendants deny each and all of the allegations in said complaint of intervener to the extent that they are inconsistent with the averments of this answer or inconsistent with the assailed orders of the Commission.

Wherefore, the defendants pray that the intervening complaint be dismissed and that the relief prayed for by the intervening plaintiff be denied.

Robert W. Ginnane, General Counsel; H. Neil Garson, Associate General Counsel, Interstate Commerce Commission, Washington 25, D. C., Attorneys for the Interstate Commerce Commission.

Lee Loevinger, Assistant Attorney General; John H. D. Wigger, Attorney, Department of Justice, Washington 25, D. C.; James P. O'Brien, United States Attorney, Chicago, Illinois, Attorneys for the United States of America.

[fol. 111] Certificate of service (omitted in printing).

[fol. 112]

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 61 C 169

A. L. MECHLING BARGE LINES, INC., et al.,

v.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION, et al.

OPINION—September 18, 1962

Before Kiley, Circuit Judge, and Hoffman and Austin, District Judges.

This is a suit by Mechling Barge Lines, Inc., a common carrier, and several grain elevator operators served by barges, to set aside an order of the Interstate Commerce Commission. The order continued in existence a reduced rail rate for corn and corn products transported on the New York Central Belt Line. The Chicago Board of Trade was permitted to intervene as a plaintiff and the New York Central Railroad and several grain elevator operators on its Belt Line were permitted to intervene as defendants.

The Belt Line west of Kankakee, Illinois, roughly parallels the Illinois River on which the barges operate. The barge lines and elevators served by them are in competition with the Belt Line and elevators served by it for the business of transporting corn from northern and central Illinois to destinations on the eastern seaboard. Some farmers sell their corn to elevators for transportation by barge to an east-west railroad and others sell theirs to elevators for transportation by the north-south Belt Line to a connecting east-west railroad or to merchants in Chicago. The transportation rates are of course very important in the competition.

Prior to the published New Kankakee all-rail combination rate, the through one-factor rates for grain and grain prod-

ucts from Streator on the Kankakee Belt Line to New York [fol. 113] were 72.5¢ per cwt.; the Chicago combination from stations on the Kankakee Belt Line consisted of a local rate of 23¢ to Chicago, plus the 49.5¢ reshipping rate east, or 72.5¢ per cwt.; the Kankakee combination rate from stations on its Belt Line to Kankakee and reshipping to the east was also composed of the same rate factors. Thus, the through one-factor rates, the Chicago combination and the Kankakee combination, were all equal.

The proposed new Kankakee combination reduced the rate on corn and corn products from stations on the Kankakee Belt Line to 6¢ on corn milled-in-transit for the purpose of meeting the barge competition on the Illinois River, plus a reshipping rate of 49.5¢ beyond Kankakee to the east. The local, or 6¢, rate was to apply only when the product was destined for shipment to eastern destinations. The local, or 6¢, rate was not applicable to whole corn, nor was the rate to Chicago reduced although the Kankakee combination was available to Chicago processors via Kankakee. Application of the new Kankakee combination resulted in a charge less for the longer than for the shorter distance of transportation in that a lower charge from stations west of Kankakee to the east was effected than resulted from Kankakee and intermediate origins to the same destinations.

The New York Central Railroad applied to the Commission for approval, to obviate the violations of 49 U.S.C.A. Section 4,[1] of a proposed rate. Plaintiffs and the Board of Trade protested the application. The Commission granted temporary authority for immediate application of the rate, but ordered a hearing.

The scope of review to be accorded this order is conceded by all litigants to be governed by the Administrative Procedure Act, 5 U.S.C.A., particularly Section 1009(e).[2]

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[1] 49 U.S.C.A. Section 4. Long and short haul charges; competition with water routes.

[2] Section 1009(e) provides for the scope of judicial review of agency action to ensure that such action is not unlawfully withheld or unreasonably delayed, or not in accordance with law, procedural or substantive, and that such action is warranted in fact and supported by substantial evidence.

[fol. 114] Because no dispute exists as to the standards to be applied, this court will allude briefly to the basic concept of such review. In *Rochester Tel. Corp.* v. *United States*, 307 U.S. 125, 140 (1938), the scope of review is stated to be as follows:

> " • • • Only questions affecting constitutional power, statutory authority, and the basic prerequisite of proof can be raised. If these legal tests are satisfied, the Commission's order becomes incontestable. Interstate Commerce Comm. v. Illinois Central R. Co., 215 U.S. 452, 470; Interstate Commerce Comm'n v. Union Pacific R. Co., 222 U.S. 541."

Plaintiffs claim error in the refusal of the Examiner and the Commission to admit evidence that the proposed rate was discriminatory, unjust and unreasonable, in violation of the Transportation Act;[3] and that the rate failed to preserve the inherent advantage that the National Transportation Policy[4] gives the water carrier. The evidence was excluded for the reason that it was not appropriate in this "Fourth Section" proceeding although it would be pertinent upon a complaint under Section 13(1)[5] or a Commission investigation under Section 15(1).[6]

[fol. 115] Plaintiffs argue that the Examiner and Commission were bound not to grant the application under Section 4 if to do so involved violation of the other sections noted. We are referred to the Commission's conclusion that granting the application "would not be disharmonious with the other provisions of the Act," to show what the plaintiffs contend is an inconsistency.

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[3] 49 U.S.C.A. Section 15(1).

[4] The declared national transportation policy is to provide, preserve and promote the "fair and impartial regulation of all modes of transportation • • • to recognize and preserve the inherent advantages of each," in order to ensure a national transportation system adequate to meet the needs of commerce and national defense. 49 U.S.C.A. note preceding Section 1.

[5] 49 U.S.C.A. Section 13(1).

[6] 49 U.S.C.A. Section 15(1).

We may disregard that conclusion as surplusage and we see no error in the exclusion of the evidence of violation of other sections of the Act. The relief granted is permissive only and the evidence offered was not relevant in this Fourth Section proceeding. *United States* v. *Merchants & M. Traffic Ass'n*, 243 U.S. 178 (1916). Due regard was given to the policy and statutory scheme of the Act within the limits afforded by Section 4 and under that Section the Commission is not required to make specific ultimate findings that a rate is lawful and not discriminatory. The water carrier and other plaintiffs have failed to ultilize the provisions of sections of the Act which afford the Commission the proper scope for such determination. *United States* v. *Merchants & M. Traffic Ass'n*, 242 U.S. 178, 188 (1916); *Koppers Co.* v. *United States*, 132 F. Supp., 159, 163 (D.C. Pa., 1955); *Florida Citrus Comm'n* v. *United States*, 144 F. Supp. 517, 526 (D.C. Fla., 1956); *Seatrain Lines* v. *United States*, 168 F. Supp. 819, 825 (D.C.N.Y., 1958).

The Commission found that the "competitive situation which prevailed prior to the proposed rate between the all-rail and barge-rail rates" needed an adjustment under Fourth Section relief. It required a showing that the proposed rates are "reasonably compensatory and no lower than necessary to meet the competition." It found that the evidence that the proposed rate was compensative and set forth the details supporting that finding, and concluded that the New York Central had shown "a special case within the [fol. 116] meaning of Section 4[7] of the Act by nature of actual and compelling competition," and that the rate was no lower than necessary to meet that competition, was not

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[7] Section 4 of the Transportation Act provides:

"• • • That upon application to the Commission and after investigation, such carrier, in special cases, may be authorized by the Commission to charge less for longer than for shorter distances for the transportation of . . . property . . . but in exercising the authority conferred upon it by this proviso, the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and no such authorization shall be granted on account of merely potential water competition not actually in existence; . . ."

destructively competitive and would not impose an undue burden on other traffic.

The question raised upon these findings and conclusions is whether the Commission was correct in considering the entire combination rate within the compensatory test of Section 4, or whether, as the Hearing Examiner did, it should have confined such test to the local rate from Moronts to Kankakee, i.e., the 6¢ rail charge for the trip from the western origins of the Kankakee Belt Line to Kankakee. Admittedly, the only rate competitive to the barge route is the local or proportional rate to Kankakee, there having been no change in the 49.5¢ reshipping rate to the east. However, as the Commission emphasized, the 6¢ charge is not collected separately. When shipments originate west of Kankakee they are shipped to Kankakee via the local or flat rate of 23¢ and only when there is a reshipment for corn milled-in-transit to points east of Kankakee will the 6¢ rate be applied. Thus, on reshipment east, there is adjustment made giving recognition to through shipping by reducing the flat or local rate to the 6¢ figure. Consequently, the 6¢ does not exist as a separate charge, but exists only when the combination rate comes into being and a departure from the prohibition of Section 4 occurs when the 49.5¢ reshipping rate is applied. It is clear from the legislative history of this section that Congress was [fol. 117] concerned with the long-haul being reasonably compensatory to the carrier and that the Commission so find to grant Section 4 relief. See *Detroit Board of Trade* v. *Grand Trunk Railway*, 2 I.C.C. 199, 202 (1888); *Imperial Coal Co.* v. *Pittsburgh & L.E. R. Co.*, 2 I.C.C. 436, 445 (1889); and *Sheldon Axle & Spring Co.* v. *Lehigh R.R. Co.*, 53 I.C.C. 43, 44 (1919). The Commission was correct in considering the combination rate and not the single 6¢ proportional.

The final question is whether the report and the findings and conclusions are supported by substantial evidence in the record as a whole. A departure from Section 4 is accorded only in special cases. The record is replete with exhibits and testimony which show that prior to the changed rate almost all free corn, as distinguished from government corn, grown in the geographical area involved was shipped via barge to Chicago and thence by rail to its

eastern termini. This obvious disparity of corn shipment was found to exist by the Hearing Examiner and the Commission. 310 I.C.C. 438-441. That a special case exists by virtue of actual and compelling competition has been recognized. *In re Louisville & Nashville R.R. Co.*, 1 I.C.C. 31, 78 (1887); *Intermountain Rate Cases*, supra; *Skinner & Eddy Corp.* v. *United States*, 249 U.S. 557 (1919); *Nepheline Syenite from Ontario, Canada to the East*, 308 I.C.C. 561, 564-565 (1959).

A reasonably compensatory rate was defined by the Commission in the *Transcontinental Cases of 1922*, 74 I.C.C. 48, 71, as follows:

> "• • • We are of the opinion and find that in the administration of the fourth section the words 'reasonably compensatory' imply that a rate properly so described must (1) cover and more than cover the extra or additional expenses incurred in handling the traffic to which it applies; (2) be no lower than necessary to meet existing competition; (3) not be so low as to threaten the extinction of legitimate competition by water carriers; and (4) not jeopardize the appropriate return on the value of carrier property generally, as contemplated in Section 15(a) of the act."

[fol. 118] These criteria have received judicial approval. See *Dixie Carriers* v. *United States*, 143 F. Supp. 844 (D.C. Tex., 1956). In the instant case compensative earnings, rate levels and operating costs were submitted to support the compensativeness of the proposed rate. 310 I.C.C. 437, 448-449. This was a proper formula to support the Commission's findings. *Fed. Power Comm'n* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 586 (1942); *United States* v. *Northern Pacific Ry. Co.*, 288 U.S. 490, 500 (1933); *Youngstown Sheet & Tube Co.* v. *United States*, 295 U.S. 476, 480 (1935); *City of Harrisonburg* v. *Chesapeake & O. Ry. Co.*, 34 F. Supp. 64, 644-645 (D.C. Va. 1940); *Tidewater Association Oil Co.* v. *A.T. & S.F. Ry. Co.*, 278 I.C.C. 586, 589; *Summer Co.* v. *Erie R. Co.*, 262 I.C.C. 43, 46. In finding that the rate was no lower than necessary, the Commission also examined the bid prices of the two modes of transportation and the effect they had on those country elevators located between the Illinois River and the Belt.

In finding that the rate was not destructive of competition nor unduly burdensome, the Commission had before it evidence of the amount of corn shipped via the two modes of transportation in the periods here in question.

In scrutinizing the evidence upon which the order is premised, the court will not consider the "expediency or wisdom of the order, or whether, on like testimony it would have made a similar ruling." *Interstate Commerce Comm'n* v. *Union Pacific R. Co.*, 222 U.S. 541, 547, 548 (1911); *Virginian Railway Co.* v. *United States*, 272 U.S. 658, 663 (1926); *United States* v. *Pierce Auto Lines*, 327 U.S. 515, 536 (1945), but will consider only whether in the record as a whole there is substantive evidence to support the order. 5 U.S.C.A. Section 1009(e); *Universal Camera Corp.* v. *Labor Board*, 340 U.S. 474 (1950).

There is no challenge of the detailed facts underlying the findings or conclusions and we find that there is the requisite substantial basis for the findings and conclusions. *Rochester Tel. Corp.* v. *United States*, 307 U.S. 125, 140. [fol. 119] We conclude that the order in question was within the statutory power of the Commission, that it is supported by findings and conclusions based on substantial evidence, and that no prejudicial error occurred in the hearings before the Examiner and Commission. For these reasons we think the complaint should be dismissed. The order of dismissal is being entered this day.

Date: September 18, 1962.

Edward P. Hayes and Wilbur Legg, Mechling Barge, 135 S. LaSalle Street (3).

Richard M. Freeman and Harold E. Spencer, Chicago Board of Trade, One N. LaSalle (2).

Robert W. Ginnane, General Counsel, Interstate Commerce Commission, Washington 25, D.C.

John H. D. Wigger, Dept. of Justice, Washington 25, D.C.

Richard J. Murphy, New York Central, 1225 LaSalle Street Station (5).

Leo P. Day, Elevator Operator defendants, 6202 S. Campbell Avenue (29).

[fol. 120]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

61 C 169

A. L. MECHLING BARGE LINES, INC., et al.,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, et al.

JUDGMENT—September 18, 1962

The above entitled cause having come on for final hearing before a duly constituted district court of three judges convened pursuant to Sections 2284 and 2326 of Title 28, United States Code, and the Court having considered the pleadings and the record before the Commission, and the arguments and briefs of counsel, and the Court being fully advised in the premises and having filed its opinion, it is hereby

Ordered, Adjudged and Decreed that the relief prayed for in the complaint be, and it is hereby, denied, and the complaint is dismissed, plaintiff to pay the costs.

Dated this 18th day of September, 1962.

Roger J. Kiley, Judge, United States Court of Appeals; Julius J. Hoffman, Judge, United States District Court; Richard B. Austin, Judge, United States District Court.

[fol. 122] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Civil Action No. 61 C 169

[Title omitted]

NOTICE OF APPEAL OF A. L. MECHLING BARGE LINES INC., ET AL. TO THE SUPREME COURT OF THE UNITED STATES —Filed November 16, 1962

I.

Notice is hereby given that A. L. Mechling Barge Lines Inc., Ira Bookwalter, Cullom Cooperative Grain Company, Charles Treasure, Griswold Grain Company, and Mazon Farmers Elevator, plaintiffs above named, hereby appeal to the Supreme Court of the United States from the final order dismissing the complaint herein entered in this action on September 18, 1962.

This appeal is taken pursuant to 28 U.S.C.A., Sections 1253 and 2101(b).

II.

The Clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme [fol. 123] Court of the United States and include in said transcript the following:

1. Opinion of the Court dated September 18, 1962.
2. Complaint of A. L. Mechling Barge Lines Inc., et al. and all exhibits filed January 31, 1961.
3. Answer of the United States and the Interstate Commerce Commission filed April 10, 1961.
4. Answer of New York Central Railroad Company, intervening party defendant.
5. Answer of McNabb Grain Company, etc., intervenors as parties defendant.

6. Record below as filed by the Interstate Commerce Commission.

7. Intervening complaint of Board of Trade of the City of Chicago.

8. Answer of McNabb Grain Company, et al., intervening parties defendant to complaint of Board of Trade of the City of Chicago.

9. Answer of New York Central Railroad Company to complaint of Board of Trade of City of Chicago.

10. Answer of United States and Interstate Commerce Commission to complaint of Board of Trade of City of Chicago.

III.

The following questions are presented by this appeal:

1. In a proceeding under Section 4 of the Interstate Commerce Act, enforced and administered so as to give effect to the National Transportation Policy, was it error for the Interstate Commerce Commission to refuse to consider evidence that a separately published inbound factor of a two-factor rail rate was non-compensatory, when only that one factor was subject to the competition claimed as a justification of the Fourth Section departure for which approval was sought, thereby requiring the non-competitive reshipping factor of the rate, which was applicable to the traffic brought to the reshipping point by water, to subsidize the competitive and non-compensatory inbound factor and financing that said non-compensatory, water-competitive rail service with rail revenue from other rail service that is not water-competitive?

[fol. 124] 2. Is Section 4 of the Interstate Commerce Act applied in accordance with the mandate of the National Transportation Policy when a reduced rail rate departing from the 4th Section is authorized, which rate will divert traffic from water carriers, yet still not increase the net revenue of the railroads proposing such departure but on the contrary will decrease it?

3. In considering whether a combination two-factor rail rate on corn products was compensatory within the meaning of Section 4 of the Interstate Commerce Act, enforced and administered to carry out the National Transportation Policy, was the Interstate Commerce Commission in error in considering the revenue from both factors of the rate and in refusing to consider evidence that the applicant railroads would receive the revenue from the non-competitive reshipping rate factor whether corn was brought to the reshipping point by water or by rail, whereas the inbound rail rate factor would not be sufficient to cover out-of-pocket costs of the applicants on the inbound rail haul?

4. In a proceeding under Section 4 of the Interstate Commerce Act instituted after duly filed protests alleged violations of the National Transportation Policy and of other sections of the act, was it error for the Interstate Commerce Commission to authorize a rate violating Section 4 without considering duly presented evidence, introduced without objection, that such rate would violate such other sections of the Act and the mandate of the National Transportation Policy, and excluding other evidence to like effect?

5. In a proceeding under Section 4 of the Interstate Commerce Act was the conclusion of the Commission that the applicant rail carriers had shown a special case authorizing the establishment of the rate in question (contrary to the examiner's findings) based on requisite findings supported by substantial evidence?

Edward B. Hayes, Wilbur S. Legg, Attorneys for Plaintiffs.

Lord, Bissell & Brook, Of Counsel, 135 South LaSalle Street, Chicago 3, Illinois, Telephone: 346-7475.

[fol. 125] Certificate of service (omitted in printing).

[fol. 126] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Title omitted]

Civil Action No. 61 C 169

NOTICE OF APPEAL OF BOARD OF TRADE OF CITY OF CHICAGO TO THE SUPREME COURT OF THE UNITED STATES—Filed November 16, 1962

I.

Notice is hereby given that Board of Trade of the City of Chicago, intervening plaintiff herein, hereby appeals to the Supreme Court of the United States from the final judgment entered herein on September 18, 1962, which dismissed the complaint herein.

This appeal is taken pursuant to 28 USC §§ 1253 and 2101(b).

[fol. 127] II.

The clerk will please prepare a transcript of the record of this case for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. Complaint of A. L. Mechling Barge Lines Inc., et al., and all exhibits attached thereto, filed January 31, 1961.
2. Answer of the United States and the Interstate Commerce Commission, filed April 10, 1961.
3. Answer of The New York Central Railroad Company intervening defendant, filed April 20, 1961.
4. Answer of McNabb Grain Company, et al., interveners as parties defendant, filed April 20, 1961.

5. Record of proceedings before the Interstate Commerce Commission, as filed herein by the Commission.

6. Motion of Board of Trade of the City of Chicago for leave to intervene as a party plaintiff.

7. Order permitting Board of Trade of the City of Chicago to intervene as a party plaintiff, entered November 30, 1961.

8. Intervening complaint of Board of Trade of the City of Chicago, filed November 30, 1961.

9. Answer of McNabb Grain Company, et al., intervening parties defendant to intervening complaint of Board of Trade of the City of Chicago, filed December 27, 1961.

[fol. 128]

10. Answer of The New York Central Railroad Company to intervening complaint of Board of Trade of the City of Chicago, filed December 28, 1961.

11. Answer of the United States and the Interstate Commerce Commission to intervening complaint of Board of Trade of the City of Chicago, filed December 28, 1961.

12. Transcript of proceedings before the Court at hearing on April 2, 1962.

13. Opinion of the Court, filed September 18, 1962.

14. Judgment order, filed September 18, 1962.

15. This notice of appeal.

III.

The following question is presented by this appeal:

May the Interstate Commerce Commission, over the protest of affected shippers and localities, authorize rail carriers to maintain rates which depart from the long-and-short-haul requirement of section 4 of the Interstate Commerce Act, without considering and determining whether

such fourth-section-departure rates would violate sections 2 and 3 of the Act by causing unjust discrimination and [fol. 129] undue prejudice against such shippers and localities?

Harold E. Spencer, Richard M. Freeman, One North LaSalle Street, Chicago 2, Illinois, CEntral 6-0204, Attorneys for Board of Trade of the City of Chicago, intervening plaintiff-appellant.

Belnap, Spencer, Hardy & Freeman, Of Counsel.

[fol. 130] Proof of Service (omitted in printing).

[fol. 142] Secretary of Interstate Commerce Commission's certificate to the following papers (omitted in printing).

[fol. 143]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Susp.-12352

NOTICE—August 26, 1957

Petitions have been filed with the Commission requesting suspension of a proportional rate on corn and corn products, carloads, minimum weight 100,000 pounds. Such proposed rate to be applicable from seventeen origins in Illinois to Kankakee, Ill., for application on through traffic to points in Central Territory, as set forth in Supplement 126 to New York Central Railroad Company tariff I.C.C. 1169 to become effective August 29, 1957.

Upon consideration of the matters involved, the Commission, Board of Suspension, today concluded not to suspend the operation of this schedule.

No action has as yet been taken as to Fourth Section application No. 33955.

This action does not constitute approval of the protested schedules. They may be made subject to investigation through formal complaint filed in accordance with the Commission's Rules of Practice.

Robert J. Test, Acting Secretary.

[fol. 144]

BEFORE THE INTERSTATE COMMERCE COMMISSION

WESTERN UNION TELEGRAM

MAC27

M CD172 NL PD=CHICAGO ILL 26=

HON HAROLD D MCCOY, SECRETARY=

INTERSTATE COMMERCE COMMISSION
WASH DC=

THIS MATTER REQUIRES EXPEDITED HANDLING UNDER THE COMMISSIONS SPECIAL RULES OF PRACTICE STOP RE BOARD OF SUSPENSIONS DECISION NOT TO SUSPEND SUPPLEMENT 126 NYC TARIFF 701-A ICC 1169 A L MECHLING BARGE LINES INC. EMINGTON GRAIN COMPANY, BOOKWALTER GRAIN COMPANY, CULLOM COOPERATIVE GRAIN COMPANY DALE P. WALSH, CHARLES TREASURE, GRISWOLD GRAIN COMPANY MAZON FARMERS ELEVATOR PETITION COMMISSION TO RECONSIDER ON BASIS OF MATERIALS PREVIOUSLY SUBMITTED TO COMMISSION RE FSA 33955 AND THEIR PETITIONS TO SUSPEND SAID SUPPLEMENT AND FURTHER ON BASIS OF ABSENCE OF ANY ORDER BY FOURTH SECTION BOARD AUTHORIZING FOURTH SECTION DEPARTURES CREATED BY SAID SUPPLEMENT=

EDWARD B HAYES=.

[fol. 145]

BEFORE THE INTERSTATE COMMERCE COMMISSION

FOURTH SECTION ORDER No. 18784—August 27, 1957

Corn and Corn Products, Illinois to Official Territory

By fourth-section application No. 33955 as amended, O. E. Schultz, agent, for and on behalf of carriers parties to Agent H. R. Hinsch's tariffs I.C.C. 4403 and 4499 and The New York Central Railroad Company's tariff I.C.C. 1169,

applies for authority to establish and maintain the rates hereinafter described without observing the long-and-short-haul provision of section 4 of the Interstate Commerce Act. An investigation of the matters and things involved in the application having been made, which application as amended is hereby referred to and made a part hereof:

It is ordered, That applicants in No. 33955 as amended, be, and they are hereby, authorized to establish and maintain over their proposed routes for the transportation of corn and corn products, in carloads, as more fully described in the application, from points in Illinois on The New York Central Railroad Company, Van's Siding to Moronts, inclusive, to points in central, trunk-line and New England territories, rates constructed on the basis described in the application, as proposed therein, and to maintain higher rates from and to intermediate points; *Provided,* That rates from and to such higher-rated intermediate points shall not be increased except as may be authorized by this Commission, nor exceed the lowest combination of rates subject to the Interstate Commerce Act.

And it is further ordered, That the relief herein authorized shall continue until the effective date of the further order to be entered after hearing in fourth-section application No. 33955 as amended.

The Commission does not hereby approve any rates that may be filed under this authority, all such rates being subject to complaint, investigation and correction if in conflict with any provision of the Interstate Commerce Act.

By the Commission, Fourth Section Board.

Harold D. McCoy, Secretary.

[fol. 146]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Washington, D. C.

Susp.-12352

NOTICE—August 27, 1957

Division 2, acting as an appellate division, voted today not to suspend protested schedules naming a proportional rate on corn and corn products, carloads, minimum weight 100,000 pounds, applicable from seventeen origins in Illinois to Kankakee, Ill., for application on through traffic to points in Central Territory, as set forth in Supplement 126 to New York Central Railroad Company tariff I.C.C. 1169 to become effective August 29, 1957.

The Board of Suspension had concluded not to suspend the protested schedules and the action of Division 2 followed the filing of an appeal for reconsideration of the Board's action. The action of the Board of Suspension and of Division 2 does not constitute approval of the protested schedules.

Robert J. Test, Acting Secretary.

[fol. 147]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Aug 28 '57 197625

WESTERN UNION TELEGRAM

M CD919 NL PD=CHICAGO ILL 27=

HONORABLE HAROLD D MCCOY=

SECRETARY INTERSTATE COMMERCE COMMISSION WASH DC=

THIS MATTER REQUIRES EXPEDITED HANDLING UNDER THE COMMISSION'S SPECIAL RULES OF PRACTICE STOP TODAY FOURTH SECTION BOARD GRANTED TEMPORARY FOURTH SECTION RELIEF ON APPLICATION OF TRAFFIC EXECUTIVE ASSOCIATION EASTERN RAILROADS, ICC NO 33955, E R NO 2386, IN CONJUNCTION WITH SUPPLEMENT 126, NYC TARIFF 701-A, ICC 1169 TO BECOME EFFECTIVE AUGUST 29, 1957 STOP A L MECHLING BARGE

LINES INC EMMINGTON GRAIN COMPANY=BOOKWALTER GRAIN COMPANY, CULLOM COOPERATIVE GRAIN COMPANY, DALE P. WALSH CHARLES TREASURE, GRISWOLD GRAIN COMPANY AND MAZON FARMERS ELEVATOR PETITION THE COMMISSION TO RECONSIDER THIS ACTION BECAUSE 5½ CENTS RATE NOW ILLEGALLY IN EFFECT IS SO LAW THAT IT HAS ALREADY ENABLED KANKAKEE BELT ELEVATORS TO BID APPROXIMATELY 5 CENTS PER HUNDREDWEIGHT MORE FOR CORN THAN RIVER ELEVATORS DO AND TO DIVERT APPROXIMATELY ONE-THIRD OF CORN IN RIVER AREA FROM RIVER ELEVATORS WHICH SHIP VIA MECHLING STOP IT IS EXPECTED THAT VOLUME OF THE DIVERSION WILL SUBSTANTIALLY INCREASE IF THE 5½ CENTS RATE IS AUTHORIZED BY THE COMMISSION AND SHIPPERS CAN DEPEND ON ITS CONTINUED EXISTENCE AND EVEN MORE DURING CORN HARVEST STARTING IN OCTOBER STOP ELEVATOR OPERATOR PETITIONERS CAN BUY GRAIN IN COMPETITION WITH KANKAKEE BELT STATIONS ONLY BY BIDDING PRICES WHICH FORCE THEM TO SPECULATE ON MARKET FLUCTUATIONS TO OBTAIN SUFFICIENT EXPENSES AND CANNOT CONTINUE IF IT APPEARS THAT 5½ CENTS RATE WILL CONTINUE IN EFFECT PENDING HEARING ON PROPRIETY OF RELIEF STOP RATE IS THUS FAR LOWER THAN IS NECESSARY TO MEET WATER COMPETITION AND WILL SERIOUSLY INJURE PETITIONERS IF PERMITTED TO CONTINUE STOP PETITIONERS PRAY THAT THE COMMISSION DENY FOURTH SECTION RELIEF PENDING HEARING, ORDER RESTORATION OF RATES IN EFFECT [fol. 148] PRIOR TO DECEMBER 15, 1956, AS INCREASED BY EX PARTE 206, AND IN ACCORDANCE WITH SECTION 17(8) OF INTERSTATE COMMERCE ACT STAY THE ORDER OF THE FOURTH SECTION BOARD GRANTING FOURTH SECTION RELIEF STOP NOTICE OF PETITION BY TELEGRAPH TO O E SCHULTZ AND BY MESSENGER TO RICHARD MURPHY=

——EDWARD B. HAYES

[fol. 149]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Washington, D. C.

F. S. A. No. 33955

NOTICE—August 28, 1957

Division 2, acting as an appellate division, voted today to sustain the action of the Fourth Section Board in granting relief from the long-and-short-haul provision of section 4 of the Interstate Commerce Act in connection with rates on corn and corn products, carloads, from origins in Illinois on The New York Central Railroad Company to points in central, trunkline and New England territories.

The action of Division 2 followed the filing of appeals for reconsideration of the action of the Fourth Section Board. The action of the Fourth Section Board and of Division 2 does not constitute approval of the rates. They may be subject to an investigation through formal complaint filed in accordance with the Commission's Rules of Practice.

Robert J. Test, Acting Secretary.

[fol. 150]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Washington

NOTICE OF HEARING—October 16, 1957

Fourth Section Application No. 33955

Corn and Corn Products, Illinois to Official Territory

The above numbered application filed by Agent O. E. Schultz, which seeks authority to establish and maintain rates on corn, and corn products, carloads, from specified points in central territory to specified points in official territory, without observing the long-and-short-haul provision of section 4 of the Interstate Commerce Act, is hereby

assigned for hearing on December 4, 1957, at 9:30 A.M., United States Standard Time, at the U. S. Customs House, 610 South Canal Street, Chicago, Ill., before Examiner Walter L. Baumgartner.

By the Commission.

Harold D. McCoy, Secretary.

[fol. 151]

BEFORE THE INTERSTATE COMMERCE COMMISSION

F. S. A. No. 33955 TM:GB

Washington, 25

NOTICE OF HEARING—REASSIGNMENT—November 29, 1957

Fourth Section Application No. 33955

Corn and Corn Products—Illinois to Official Territory

Hearing in the above-entitled proceeding now assigned December 4, 1957, at Chicago, Ill., before Examiner W. L. Baumgartner, is cancelled, and this proceeding is reassigned for hearing on December 17, 1957, at 9:30 o'clock a.m., United States Standard Time, at Room 852 U. S. Custom House, 610 South Canal St., Chicago, Ill., before Examiner Albert E. Luttrell.

Postponement at request of protestants due to illness of material witness.

By the Commission.

Harold D. McCoy, Secretary.

[fol. 152]

BEFORE THE INTERSTATE COMMERCE COMMISSION

F. S. A. No. 33955 TM:LF

Washington 25

NOTICE OF HEARING—POSTPONED—December 6, 1957

Fourth Section Application No. 33955

Corn and Corn Products, Illinois to Official Territory

Hearing in the above-entitled proceeding now assigned December 17, 1957, at Chicago, Ill., before Examiner Albert E. Luttrell, is postponed to a date to be hereafter fixed.

Postponement due to necessary Commission itinerary changes.

By the Commission.

Harold D. McCoy, Secretary.

[fol. 153]

BEFORE THE INTERSTATE COMMERCE COMMISSION

F. S. A. No. 33955 TM:IC

Washington, D. C.

NOTICE OF HEARING—ASSIGNMENT—December 27, 1957

Fourth Section Application No. 33955

Corn and Corn Products—Illinois to Official Territory

The above-entitled proceeding, is assigned for hearing on January 29, 1958, at 9:30 o'clock a. m., United States Standard Time, at Room 852 U. S. Custom House, 610 S. Canal Street, Chicago, Ill., before Examiner G. A. Dahan.

By the Commission.

Harold D. McCoy, Secretary.

[fol. 154] Secretary of Interstate Commerce Commission's Certificate (omitted in printing).

[fol. 156]

BEFORE THE INTERSTATE COMMERCE COMMISSION

PETITION OF CARGILL, INCORPORATED REQUESTING SUSPENSION OF SECTION 4, PAGE 2, SUPPLEMENT 126, THE NEW YORK CENTRAL RAILROAD COMPANY FREIGHT TARIFF 701-A, I.C.C. 1169.—Filed July 17, 1957

Comes now your petitioner, Cargill, Incorporated, and respectfully states:

It is a corporation, organized and existing under the laws of the State of Delaware, with headquarters at 200 Grain Exchange, Minneapolis 15, Minnesota.

It has been and is now engaged in buying, selling, storing and otherwise handling and processing grain, soya beans and other commodities.

Your Petitioner respectfully petitions that Section 4, Page 2, Supplement 126, The New York Central Railroad Company Freight Tariff 701-A, I.C.C. 1169, issued by R. T. Waite, Manager Traffic Bureau, be suspended for investigation.

The reasons for this petition for suspension are shown in detail in Petitioners Protest, objecting to the granting of relief from the provisions of the Fourth Section of the Interstate Commerce Act, as sought by Traffic Executive Association-Eastern Railroads in Fourth Section Application—Commission No. 33955, copy of which is attached hereto and made a part hereof.

[fol. 157] Your Petitioner also requests the Commission to summarily order the carriers to cancel the following tariff provisions because of their having been published and now being in effect in violation of Section 4 of the Interstate Commerce Act:

(a) Section 4, Page 40, Supplement 122, The New York Central Railroad Company Freight Tariff 701-A, I.C.C. 1169;

(b) Item 279, Page 17 and the concluding part of the Exception in Note 20, which refers to Item 279, Page 11,

both in Supplement 93, Central Territory Railroads Tariff Bureau Freight Tariff 245-H, I.C.C. 4403;

(c) Paragraph B-6 of Exception to Note 45, shown on Page 4, Supplement 38, Central Territory Railroads Tariff Bureau Freight Tariff 535-C, I.C.C. 4499;

(d) Otherwise order, as to all of the rates, provisions and applications herein involved, the restoration of the rate schedules which were in effect prior to December 15, 1956.

Respectfully submitted,

Bernard A. Springrose, General Traffic Manager, Registered Practitioner, 200 Grain Exchange, Minneapolis 15, Minnesota.

July 15, 1957

Certificate of service (omitted in printing).

[fol. 158]

BEFORE THE INTERSTATE COMMERCE COMMISSION

PROTEST AND PETITION FOR SUSPENSION OF BOARD OF TRADE OF THE CITY OF CHICAGO—Filed July 17, 1957

Mr. Harold D. McCoy, Secretary
Interstate Commerce Commission
Washington 25, D. C.

Dear Sir:

The Board of Trade of the City of Chicago respectfully protests the following proposed tariff published to become effective July 30, 1957, and petitions the Commission to postpone the effective date thereof and suspend the operation of said schedule, and to enter upon an investigation into and concerning the reasonableness and propriety thereof:

Supplement 126 to New York Central Railroad Company Tariff 701-A, I. C. C. No. 1169

In support of its protest the petitioner shows:

I

This petition is made in behalf of the Board of Trade of the City of Chicago, a corporation existing by and under the laws of the State of Illinois, maintaining a grain exchange in that city where its members deal in various commodities including grain, grain products, by-products of grain and related articles to which this statement is directed. Its members move these commodities into and out of the market via barge and rail and are vitally interested in rates and charges that affect their traffic from [fol. 159] origins in the State of Illinois and adjacent territories, destined to points in the Central Freight Association Territory.

II

General Statement

To clearly set farth the New York Central's origin stations we have shown on Map "A", in Appendix "A" attached hereto, a section of Northern Illinois with those stations on a heavy black line between Moronts, Ill., and Kankakee, Ill. Also shown is another heavy line designating the river route of the Illinois Waterways in the same territory. Map "B" is an enlargement showing the New York Central's Kankakee Belt Line in detail.

Supplement 126 to New York Central Tariff 701-A, here protested, involves the movement of Corn Products from origins in Illinois located on the New York Central's Kankakee Belt Line from Moronts, Ill., to Van's Siding, Ill., ultimately destined to points in the Central Freight Association Territory. This supplement consists of a title page and one page of content matter as shown on pages 1 and 2 in the Appendix. While page 2, opposite the circle 400 reference mark, shows the application of rates to other than the Central Territory, this petition of suspension is directed solely to the addition of "Central Territory" as underscored thereon, denoting an extension of its application to the Central Territory. Its purpose is to meet truck and barge competition from the same origin territory to the Central Territory which presently moves on an aggregate of charges including; trucking from farm or country eleva-

tor to the river port; elevation thereat; the barge rate to Chicago; and the established rail proportional rate from Chicago to the final destination in C.F.A. territory. Therefore proper consideration of the competitive situation re-
[fol. 160] quires an examination of *all costs* incurred in the movement. The New York Central has not done this. They merely take the barge rate to Chicago and the proportional rate therefrom and claim that to be the basis they must meet. Stated differently, since the proportional rate from Chicago to the C.F.A. territory is the same from Kankakee, the N.Y.C. is publishing a 5½¢ (X-206) rate from all stations Moronts to Van's Siding to Kankakee, to which the rail proportional rate is added. No consideration has been given to the other charges or costs necessarily incurred in the truck-barge-rail movement in arriving at their 5½¢ competitive rate to the reshipping point. Therefore, they have gone below the competitive rate and the effect thereof will be to divert *all of the business* away from the barge lines, and other western railroads operating in the area to the line of the New York Central constituting an "unfair and destructive competitive practice."

III

Violation of Section 5a of the Interstate Commerce Act

Supplement 126 to New York Central's tariff 701-A, I.C.C. No. 1169, was issued on June 28, 1957 to become effective July 30, 1957 without observance of approved Rules of Procedure required by Section 5a of the Interstate Commerce Act. There were three vital omissions required by law to safeguard the public's rights, namely, a written proposal signed by the proponent, public notice, and opportunity for shippers and other interested parties to appear before the Committee in a public hearing. None of these requirements were met.

The agreements approved by the Interstate Commerce Commission for the Illinois Territory Railroads, Eastern Railroads, and the Interterritorial Agreement read in part as follows:

[fol. 161] Agreement of Illinois Territory Railroads

Article III. *Procedure.*

Section 2. *Proposals.* Freight traffic matters to be considered initially by any Committee, unless otherwise acceptable in any instance to its members, *shall be presented to it by a member thereof, or any other interested party, by a written proposal signed by the proponent.* (quoted in part—italics ours).

Section 3. *Public Notice of Proposals.* The Chairman of the Committee to which a proposal is properly presented *will give prompt public notice of the proposal by publication of a synopsis thereof in a recognized traffic journal of national circulation* stating that interested shippers and other interested parties, within 14 days after such publication, *may communicate their views regarding it to the Chairman.* (quoted in part—italics ours.)

Section 8. *Hearings. Shippers and other interested in any proposal,* upon request to the Chairman of the Committee before which it is pending, *will be accorded opportunity to appear before the Committee to present facts and other* considerations material and relevant to the proposal. (quoted in part—italics ours).

Agreement of Eastern Railroads

Article III. *Procedure.*

Section 2. *Proposals.* Traffic matters to be considered initially by any organization, unless otherwise determined by its members, *shall be presented* to it by a member thereof, or any other interested party, *by a written proposal signed by the proponent.* (quoted in part—italics ours).

Section 3. *Public Notice of Proposals.* The Chairman of an organization to which a proposal is properly presented *will give prompt public notice of the proposal by publication of a synopsis thereof in the Traffic*

World or other recognized traffic publication, stating that interested shippers and other interested parties, within 14 days after such publication, *may communicate their views regarding it to the Chairman.* (quoted in part—italics ours).

Section 8. *Hearings. Shippers and other interested* in any proposal, upon request to the Chairman of the Committee before which it is pending, *will be accorded reasonable opportunity to appear before the Committee to present facts and other considerations material and relevant to the proposal.* (quoted in part—italics ours).

[fol. 162] Interterritorial Agreement

Article II.

Section 1(b). Any interterritorial traffic matter *may be presented* or proposed to the appropriate organization in any territory by any carrier or interested person *in the same manner as other matters are presented thereto under the territorial agreement applicable therein.* (italics ours.)

Section 1(c). The Chairman of the territorial organization to which an interterritorial traffic matter is presented *will give public notice of the same in accordance with the procedures of his territorial agreement* and, in addition, give notice thereof to the chairman of the appropriate organization in each other territory that may be involved or affected.

Section 5(a). *Shippers and others interested* in any proposal of an interterritorial traffic matter *may orally present facts and considerations pertinent thereto* to any territorial organization considering the proposal, subject to the provisions of the territorial agreement under which such territorial organization functions.

Therefore, the traffic matters contained in supplement 126 to N.Y.C. tariff 701-A scheduled to become effective July 30, 1957 were:

1. Without a written proposal that shippers or other interested parties could examine,
2. Without public notice of any description,
3. Without opportunity for shippers or other interested parties to request and participate in a public hearing.

This is an outright denial of the shipping public's rights to be heard prior to tariff publication of joint rates—and to which they should now be heard in full. Request is hereby made for suspension of supplement 126 to New York Central tariff 701-A, I.C.C. No. 1169, under an investigation and suspension proceeding with public hearing assigned at Chicago, Illinois, in order that the rights for all parties are properly protected.

[fol. 163]

IV

Unfair and Destructive Competitive Practices

The National Transportation Policy states in part, "It is hereby declared to be the National Transportation Policy of the Congress . . . To encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantage, *or unfair or destructive competitive practices;* . . ."

The proposed rates in Supplement 126 to N.Y.C. Tariff 701-A violates this policy. The establishment of a 5½¢ (X-206) rate from Moronts, Illinois to Kankakee, Illinois for 83½ miles requires close examination. The New York Central maintains that 5½¢ is necessary to meet barge competition which they claim *exists in equal effect throughout the 83½ miles.* This is not true. A cursory examination of the competitive situation in Illinois along the line of the New York Central shows that the establishment of a 5½¢ rate amounts to "an unfair and destructive competitive practice". Because of the difficulty in obtaining this evidence, we are not able at this moment to show the complete competitive situation. We respectfully request a public hearing where the Chicago Board of Trade will undertake to show in a comprehensive manner the competitive situation along the New York Central and the adjacent territory. A

competitive railroad like the Gulf, Mobile & Ohio Railroad, for example, which serves Dwight, Illinois, has one thing to consider when it desires to meet barge competition at a competitive level, *which is altogether different* than will arise under the tariffs here protested if the New York Central Railroad is permitted to publish this ridiculously low level of rate into Kankakee. Existing barge competition [fol. 164] might dictate a reduction of four or five cents per 100 pounds by the G.M. & O. to meet barge competition, but the proposed 5½¢ N.Y.C. rate would require an impossible 13¢ or 14¢ reduction. The New York Central, by establishing a 5½¢ rate from Moronts and intermediate points to Kankakee is erecting an exclusive "conveyor belt" over which grain would move to the exclusion of every railroad operating in the territory and to the barge lines who seek their fair place in the transportation picture. The admonitions in the Transportation Policy enacted by the Congress of the United States prohibits this type of competition made on the thin allegation that that level is necessary to attract the business. New York Central here publishes a level of rate far lower than necessary to fairly compete with other modes of transportation ignoring completely the economic status of other railroads operating in the territory, and the shipping public dependent upon them. Furthermore, they add insult to injury by catering to a select class of shippers by limiting the use of the ridiculously low rate to a particular type of traffic, namely, Products of Corn.

Cases before the Commission and the Courts in this regard show:

> *'Competition and rate making:* "The Commission has the power and jurisdiction to restrain rail rate reductions when necessary to enforce compliance with the national transportation policy."—Atlanta & St. A.B. Ry. Co. v. United States, 104 F. Supp. 193 (198)*.
>
> "The commission is charged with the specific duty to preserve the inherent advantages of each mode of transportation subject to provisions of the act, and *to prevent and eliminate unfair and destructive competition not only within each form,* but also between and among the different forms of carriage.—" Sugar Cases of 1951, 284 I.C.C. 333 (351) [Citing 321 U.S.

194]; Southwestern Tank-Truck Carriers Committee v. Abilene & S. Ry., 284 I.C.C. 75 (82, 85).

[fol. 165] "Establishment of proposed rate, *which is lower than the over-all cost of water movement,* would be lower than necessary to meet water competition, and would constitute an unfair competitive practice."—Aluminum, Point Comfort, Tex., to East Davenport, Iowa, 283 I.C.C. 85 (91).

"Being lower than necessary to meet tank-truck competition, proposed rail rates would result in an undue burden upon respondents' (rail carriers) other traffic. The problem is to arrive at an adjustment *which will square the national transportation policy and other provisions of the act,* and be fair to both form of transportation."—Petroleum Products in Illinois Territory, 280 I.C.C. 681 (691).

Again we reiterate that showing the competitive situation on grain from as many origins as are involved in Illinois is not susceptible to a quick or convenient acquisition. It is a sizeable undertaking to gather thus factual data together, not possible in time for this writing, but if a reasonable time is allowed for a public hearing this protestant will undertake a comprehensive competitive presentation for the Commission's examination.

V

Types of Discrimination Arising Under Proposed Rates

A. The proposed schedule of rates prevent the movement of grain products via Chicago, Ill., on the same basis with Kankakee, Ill., contrary to the equality that has existed over many years. Page 3 of Appendix "A" is a statement of rates from origins on the Kankakee Belt Line of the N.Y.C., showing the present rates to Chicago and Kankakee. Rates under the column headed "Other" prefixed with "(1) are the New York Central rates to Chicago applying on corn and "only on traffic destined beyond Chicago by rail." In the last column are the corn rates to Kankakee, Ill. It will be noted that all stations Moronts through Budd, Ill., have the same gathering rate to both

reshipping or proportional rate points, therefore the com-
[fol. 166] bination over Chicago and Kankakee are exactly the same from every one of these stations to destinations in the Central Territory. Likewise, if corn is processed at Kankakee or at Chicago, the total through charges are the same. *But* under the rates here protested, combinations will be built over Kankakee, Ill. on a basis of 5½¢ (X-206) to Kankakee whereas over Chicago the same high level of rates will continue. Therefore a corn processor at Kankakee will have an 18½¢ advantage over the corn processor at Chicago. The proportional rate from Kankakee to Central Territory destinations will not route via Chicago in connection with the New York Central from Kankakee to Chicago. Here, the New York Central unlawfully seeks to tie up all traffic to their long haul beyond a rate-break point in violation of Commission prescribed rate-break principles, and unjustly discriminate against Chicago who has had complete equality for decades.

B. Supplement 126 to New York Central Tariff 701-A seeks to establish rates into the Central Freight Association territory on Corn Products on the basis of a 5½¢ (X-206) rate from origins on the Kankakee Belt Line to Kankakee, Illinois, to which will be added the proportional rates in Agent H. R. Hinsch's Tariff 535-C, I.C.C. 4499. This prevents the application of the reduced level of rates from applying on Whole Corn, resulting in unjust discrimination against that particular type of traffic condemned by section 3 of the Interstate Commerce Act. For example, from Dwight, Illinois to Akron, Ohio, the proposed tariff schedule would publish a *Corn Products* rate of 43¢ made up of a 5½¢ from Dwight to Kankakee, Ill., to which would be added the proportional rate from Kankakee to Akron of 37½¢. On *Whole Corn*, however, there would exist from Dwight to Akron a 57¢ rate
[fol. 167] made up of 19½¢ from Dwight to Kankakee plus the proportional rate of 37½¢ from Kankakee to Akron, Ohio. Therefore, Whole Corn, in its natural state, would take a basis 14¢ higher than Corn in a manufactured or processed state, which is unjust discrimination under section 3 and unreasonable under section 1 of the

Interstate Commerce Act. The penalties against Whole Corn range as high as 19½¢ per 100 pounds from other origins on the Kankakee Belt Line too numerous to show here in view of the time limit placed upon this protestant under the rules of procedure before the Interstate Commerce Commission. However, at the public hearing, a complete showing will be made as to the gross inequities that arise under the proposed rate schedules to numerous destination in the C.F.A. Territory. We are of the sincere opinion that the Interstate Commerce Commission would not permit the contemplated rates to go into effect if they were fully informed in this matter.

C. Another discrimination that arises under the proposed tariff schedule is that transit operators along the route of movement are not kept in equal position contemplated under the long established theory of transit. The Interstate Commerce Commission recognized years ago that when transit is granted there shall not be unjust discrimination among those receiving the privilege. Processors located at different points along the route of movement will be affected in varying degrees by the long established "minimum rate rule" under transit and the "3-way rule," which has likewise been approved by the Commission. For example, a transit operator at Columbus, Ohio might have a carload of Corn move from Dwight, Illinois into his transit station on the basis of a 19½¢ rate from Dwight [fol. 168] to Kankakee, to which would be added the 37½¢ proportional rate from Kankakee to Columbus for a total of 57¢. While this Corn is in his possession, he processes it into Corn Products and forwards it to Akron, Ohio, the transit destination. Under the proposed rate schedule, the Corn Products rate from Dwight, Ill., to Akron, Ohio would be 43¢, made up of 5½¢ from Dwight to Kankakee, plus 37½¢ from Kankakee, to Akron, Ohio. The transit tariff at Columbus, Ohio carries a "three-way rule" which provides that the highest rate in the movement must be protected, namely, the rate from origin to the transit station, origin to transit destination, or transit station to transit destination, whichever is highest. Under the example given, the minimum rate in the movement would be 57¢ on corn from origin to transit station, resulting in a 14¢ penalty. Now we would like to *contrast that with*

a processor at Valparaiso, Indiana, where the proportional rate from Kankakee is 20¢ per 100 pounds. This transit operator would have a corn rate of 39½¢ from Dwight to Valparaiso made up of 19½¢ rate to Kankakee, plus a proportional rate from Kankakee to Valparaiso of 20¢. After the transit operator at Valparaiso had processed the Whole Corn into Corn Products and decided to sell it at Akron, Ohio, he would be entitled to move on to destination at a through 43¢ rate from which he would deduct 39½¢ from origin into his transit station and move on a transit balance from Valparaiso to Akron of 3½¢ per 100 pounds. The Valparaiso transit operator's minimum rate under the 3-way rule would be that of 43¢ on the Corn Products from Dwight to Akron without any penalty over and above the through rate. Under these two examples, we can see that the transit operator at Columbus, Ohio has been burdened with a prohibitive 14¢ per 100 pound penalty arising under [fol. 169] transit, whereas the man at Valparaiso moves on the through rate from origin to transit destination without incurring any such penalty. This too is in violation of section 3 unjustly discriminating against the Ohio processor and unduly preferring the Indiana processor. Likewise, the establishment of any system of rates that results in such absurd consequences is unreasonable in violation of section 1 of the Act.

D. In addition to the discriminations arising under the "3-way rule" just cited, there is also a discriminatory feature that arises under the "minimum rate rule" which reads, in substance, that the through rate to be protected on a shipment shall be the through rate from point of origin to final destination on the commodity received into the transit point or that shipped from the transit point whichever is higher. In other words, the through rate from origin to final destination shall in no case be less than on Whole Corn or Corn Products, *whichever is higher*. Under the example cited above, the transit operator at Columbus, Ohio already has to pay a 57¢ rate under the 3-way rule, and the minimum rate rule requires the protection of the Whole Corn rate from origin to final destination which in this case happens to also be 57¢. Now let

us consider the transit operator at Valparaiso, Indiana and see the different situation he will be in under this "minimum rate provision". He would be obliged to protect the Corn rate from Dwight, Illinois to Akron, Ohio of 57¢ made up of 19½¢ from Dwight to Kankakee, plus the proportional rate of 37½¢ from Kankakee to Akron, Ohio. He would not be entitled to use the reduced Corn Product rate from origin to final destination because of these "minimum rate provisions", therefore, since his through corn rate would be 57¢ and he has paid into his [fol. 170] transit station 39½¢, his transit balance from Valparaiso to Akron, would be 17½¢ per 100 pounds, or 14¢ per 100 pounds higher than a mere observance of the "3-way rule." *These rules vary from point to point raising a myriad of difficult rate situations.* It taxes the imagination to think of a proposed schedule of rates that would result in penalties of this kind and find them within the meaning of "to encourage the establishment and maintenance of reasonable charges" in the National Transportation Policy.

We have cited but two examples of the inequities that would arise under the proposed rate schedules, and time will not permit a further showing under the circumstances. At the public hearing, should one be granted, we will introduce evidence showing this situation in detail in order that the Interstate Commerce Commission can be fully advised as to the complete lack of consideration that has been given by the proponent carrier in publishing a system of rates with these absurd results.

VI

Fourth Section Departure Territory

The scope of the origin territory involved in the fourth section application connected with rates into the Central Freight Association territory is very large and not susceptible to a full showing at this writing. Maps portraying the fourth section territory involved in its entirety will be undertaken by the Chicago Board of Trade and presented at the hearing so the Commission can be fully informed of the extent to which the low level of rates published in Supplement 126 to N.Y.C. Tariff 701-A will be operative. We believe we are entitled to a reasonable length of time to

prepare a complete presentation of the matters involved [fol. 171] in the publication of these rates and that the Interstate Commerce Commission should be in possession of all the facts before the rates are permitted to become effective. A fourth section territory that embraces several states is of such a dimension that requires close scrutiny on the part of all interested parties as well as the Commission. There is presently assigned for hearing in Kansas City an extensive hearing to last at least one week under the Southern Governors Complaint, Docket 31874, in which the rates on grain and grain products and related articles throughout the entire country are involved and this protestant is obliged to participate actively in that hearing and, therefore, is unable to devote full time and attention to this New York Central rate situation. We therefore pray that the Commission will see fit to enter upon an investigation and suspension of this tariff schedule to permit all interested parties to accumulate all of the facts necessary to fully appraise the Commission of the unlawful situations that would result therefrom.

VII

Unlawful Control of CFA Rates by New York Central

We show on pages 4 to 6 in the appendix attached hereto, excerpts from CTR Tariff 535-C for the Commission's examination. Page 4 is the title page of this tariff stating that it contains proportional rates applying on grain and grain products. Particular emphasis should be placed upon the words "proportional rates" due to the fact that this tariff publishes only proportional rates from the stations shown thereon to points in the Central Freight Association Territory. These proportional rates apply on grain, grain products and related articles as published in CTR Tariff 600-Series without restriction. They apply freely on corn, [fol. 172] corn products as well as all other grain and grain products. The New York Central in issuing Supplement 126 to their Tariff 701-A as an originating western carrier, publishes a 5½¢ (X-206) rate from origins on their Kankakee Belt Line to Kankakee with definite restrictions at-

tached thereto, namely, "when milled in transit". Therefore, between an origin on their railroad to any transit destination in the Central Freight Association Territory *whole corn must be milled in transit in order to obtain their low 5½¢ rate.* In this manner, they are restricting CTB Tariff 535 which has long been free from restriction thereby exercising unlawful control over the Central Freight Association proportional rates. In other words, the New York Central as an origin line, has placed a restriction *in their own individual lines tariff which operates to restrict all of the proportional rates* in the agency tariff published by H. R. Hinsch contrary to the tariff rules promulgated by the Interstate Commerce Commission.

The tariff rule in issue is Rule 4(h) tariff circular 20. The pertinent portions of rule 4(h) is as follows:

> *"When rules or regulations are thus separately published, rate tariffs may be made subject thereto only by specific I.C.C. reference in the rate tariff.* This reference should be made *in substantially the following form:* Governed, except as otherwise provided herein, by rules and regulations shown in —— I.C.C. No. ——, supplements thereto or successive issues thereof."

With respect to 4(h), *In Mason By-Products Co.* v. *Director General,* 92 ICC 646 at 648 the Commission sets forth the purpose of rule 4(h) of the Circular. While the Tariff Circular 18-A rule is referred to, no substantial change is made in tariff circular 20. In this case the Commission stated:

> [fol. 173] "In rule 4(h) of our Tariff Circular 18-A containing rules governing the construction and filing of tariffs, it is provided that *all rules and regulations which in any way affect the rates shall be stated in the same tariff with the rates,* or if contained in another tariff shall be made a part of the rate tariff by specific reference "Governed by rules and regulations shown in —— I. C. C. No. ——." Rules to the same effect have been in force since January, 1907. The reason for such requirement is obvious. *Any practice which would permit of rates being changed by the use of rules not re-*

ferred to in connection with the rates themselves must of necessity tend to create the very discrimination, prejudice, and preference which the interstate commerce act was designed to prohibit and make unlawful."

In *E. L. Foote et al.* v. *Cedar Rapids & Iowa City Railway et al.* 256 ICC 263 at 267 and 268 where the following appears:

"Rule 4(h) of Tariff Circular 20 provides that, where it is not desirable or practicable to include the governing rules and regulations in the rate tariff, *they may be separately published, but that the rate tariff may be made subject to such separately published rules only by specific reference to them.*"

An examination of pages 5 and 6 show that at no place in CTR Tariff 535 is there a "when milled in transit" restriction placed upon the application of those proportional rates *and there never has been.* This N.Y.C. provision constitutes an unreasonable rule or restriction in violation of section 1 of the Interstate Commerce Act. It should be remembered that transit operators within the Central Freight Association Territory drawing grain from origins in Illinois that are made on combinations over gateways such as Kankakee, Illinois or Chicago, Illinois do not look behind the proportional rate tariff under which they operated *for extraneous restrictions.* If there are any restrictions that are to be placed on the tariffs that they use, such restrictions should be contained within the proportional rate tariff. We can well imagine the dilemma of a transit op- [fol. 174] erator at Columbus, Ohio who after forwarding a carload of whole corn to Akron, Ohio finds *that the originating carrier* operating from the country origin in Illinois to the re-shipping point, *has placed a restriction or limitation upon his use of the proportional rate tariff* which has been free and unhampered throughout many years.

While the foregoing points out the unlawful control by the New York Central as an individual carrier, is exercising over the proportional rates in the Central Freight Association Territory we wish to specifically state at this point that we do not condone the ultimate inclusion of such restric-

tion in the Central Freight Association Tariff. Grain, grain products and related articles *should continue to move in the same free and unrestricted manner as it has for many years* and any attempt to place restrictions thereon is strongly opposed by this petitioner.

VIII

Importance of an Investigation

Much has heretofore been said relative to "unfair and destructive competitive practices" in violation of the National Transportation Policy that would arise under the proposed rate schedules to become effective July 30, 1957. Injured parties located throughout the state of Illinois in personal possession of facts relating to the competitive situation will attend the public hearing, if granted, to inform the Commission of the evils arising out of an unlawfully low level of rates contemplated in supplement 126 to N.Y.C. tariff 701-A in violation of Section 1, and the unjust discrimination and undue preferences resulting therefrom in violation of section 3 of the Interstate Commerce Act. This [fol. 175] factual information is within the personal knowledge of producers, elevator operators and grain merchants located on other railroads in the territory adjacent to the New York Central's Kankakee Belt Line who have substantial investments in grain facilities which will be rendered useless for the forwarding of rail shipments due to the cross-country competition that will arise from this cut-throat type of rate construction. These interested parties should have the opportunity to appear before the Interstate Commerce Commission and express their views in this matter so vital to their continued existence in the grain business. They cannot all be reached in time to express their views in writing, and would not be able to fully express themselves in writing regarding all facets of their problem. To give these rural agriculturalists a fair opportunity to air their grievances, the Commission should suspend supplement 126 to N.Y.C. tariff 701-A and enter upon an Investigation and Suspension proceeding assigning the matter for public hearing in Chicago, Illinois, a point convenient to them.

IX

Conclusions

In our opinion, rail carriers should have the opportunity of meeting their competition at a fair level of rates that are not "unfair and destructive competitive practices" in violation of the National Transportation Policy; nor should they be so low as to cast the burden of their existence on other forms of traffic in violation of section 1; and they should not be prejudicial or discriminatory favoring some markets or gateways over others, or select shippers over others; and last but not least, favor some commodities over others, all in violation of section 3 of the Interstate Commerce Act. [fol. 176] In meeting the competition the rates should be reasonable compensatory for the service rendered, consistent with the public interest, such as will foster sound conditions in transportation, and among the several carriers, without unjust discrimination, undue preference or advantage, or unfair or destructive competitive practices. The rates involved herein are contra to every admonition enumerated in the Interstate Commerce Act and the New York Central Railroad Company should be called upon in an Investigation and Suspension proceedings to justify each and every violation thereof.

[fol. 177]

Prayer

Wherefore, the petitioner prays that the tariff schedule herein protested be suspended, the effective date thereof postponed, and its application be deferred pending an investigation into and concerning the lawfulness thereof. In addition, that a hearing be assigned on this matter at Chicago, Illinois for the convenience of the parties affected thereby.

Respectfully submitted,

Board of Trade of the City of Chicago, R. D. Erickson, Assistant Manager, Transportation Department; J. S. Chartrand, of Counsel, Transportation Department, 141 West Jackson Boulevard, Chicago 4, Illinois.

Dated at: Chicago, Illinois, July 16, 1957.

Certificate of Service (Omitted in printing).

[fol. 180] APPENDIX "A"

TO

PETITION OF SUSPENSION

FILED BY

BOARD OF TRADE OF THE CITY OF CHICAGO

TO

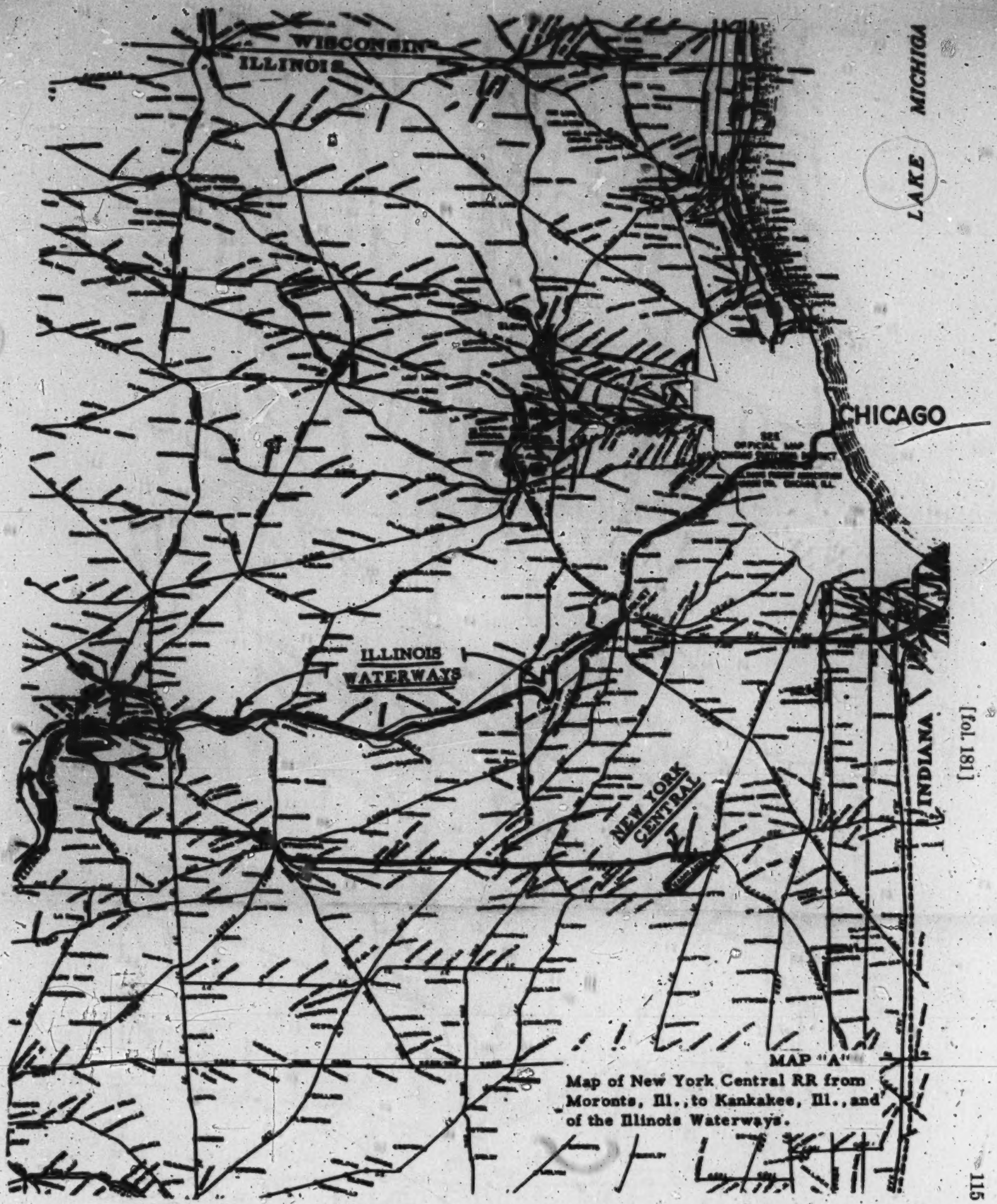
NEW YORK CENTRAL TARIFF 701-A,

I.C.C. No. 1169

MAP "A"

Map of New York Central RR from Moronts, Ill., to Kankakee, Ill., and of the Illinois Waterways.

(See opposite) ☞



MAP "A"
Map of New York Central RR from Moronts, Ill., to Kankakee, Ill., and of the Illinois Waterways.

[fol. 181]

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Subject (except as otherwise provided by "Rules") to TARIFF OF INCREASED RATES AND CHARGES X-175-C, Agent H.R. Hinsch's ICC 4679, CTC 2273, I11CC 662, PSC-NY 358, Ohio 2534, PaPUC 918, supplements thereto or successive issues thereof and subject to increase in Rates and Charges, as provided in Item X-186 Series, page 2 of Supplement 122 and subject to increase in Rates and Charges, as provided in Item X-206, page 2 of Supplement 82.

SUPPLEMENT

TO

CTC 286	MPSC 224	ICC 1169
I11CC 172	PSC-NY 541	PaPUC 204
IndRC 213	Ohio 346	PSC-WVa 135

NEW YORK Central

THE NEW YORK CENTRAL RAILROAD COMPANY

IN CONNECTION WITH
PARTICIPATING CARRIERS SHOWN ON PAGES 3 TO 5 OF TARIFF, AS AMENDED

SUPPLEMENT 126

TO

FREIGHT TARIFF 701-A

Supplements 20, 91, 122, 125, 126 and the following Special Supplement contain all changes.
Supplement 20 (Ex Parte 175)(Blanket 229).

Local, Joint and Proportional Freight Tariff

NAMING RATES IN CENTS PER 100 POUNDS (EXCEPT AS NOTED)

ON

GRAIN AND GRAIN PRODUCTS

AND OTHER ARTICLES AS DESCRIBED ON PAGES 5 AND 6 OF TARIFF

ALSO

Feed or Feed Ingredients, Animal or Poultry

AS DESCRIBED IN RULE 2, PAGE 35 OF TARIFF, AS AMENDED
IN CARLOADS (Except as Noted)

FROM STATIONS ON	TO STATIONS IN		
NEW YORK CENTRAL RAILROAD (Stations in United States, Buffalo, N.Y., Clearfield, Pa., and West) And other Initial Carriers shown on page 3 of tariff.	ILLINOIS INDIANA IOWA KENTUCKY	MICHIGAN MISSOURI NEW YORK	OHIO PENNSYLVANIA WEST VIRGINIA WISCONSIN

ALSO MILEAGE RATES, SEE PAGES 551 AND 589 OF TARIFF

Governed, except as otherwise provided herein, by Official and Illinois Classification (CFC) and by Exceptions in Agent H.R. Hinsch's Tariff 130 Series, Agent C.W. Boin's Tariff 90 Series and Agent R.E. Rausch's Tariff 80 Series (see Rule 125 of tariff, as amended).

This supplement contains Rates and Routes, subject to Reference Mark (X) that contravene the long-and-short-haul provisions of the Amended Fourth Section of the Interstate Commerce Act. Relief as to such departure is sought under Agent O.E. Schultz's Fourth Section Application 2356 of June 28, 1957.

ISSUED JUNE 28, 1957

EFFECTIVE JULY 30, 1957

Issued by
R.T. WAITE,
Manager Tariff Bureau,
466 Lexington Avenue,
NEW YORK 17, N. Y.

(NW1245-2-1000-CHR-MA) (Printed in USA) (S15-166; M4 + 1)

[fol. 183]

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EXPLANATION OF NOTES

Note 45 Cancels Note 45 pages 2 and 3 of Supplement 37.—Concluded:

B-3. **Rates on Grain Products from Peoria, Ill., and points taking same rates as shown on pages 6 to 9 incl., of tariff, as amended,** subject to the provisions of this Note, apply on shipments of Grain Products (except on commodities bearing reference mark (39), originating beyond, except will not apply on traffic originating in Trans-Mississippi River Territory (see Note 20, page 76 of tariff), Northwest Territory (see Note 40, page 84 of tariff, as amended), except as otherwise provided in paragraph B-5 below or on shipments subject to rates governed by the provisions of Note 50, page 88 of tariff; except that on shipments originating at stations shown in tariffs named in Note A, below, from which proportional rates are published to Peoria, Ill., and points taking same rates as shown on pages 6 to 9 incl., of tariff, as amended, and when the grain products are destined to the following points, rates on grain products subject to this Note, will only apply when the proportional rates published in tariffs named in Note A below, are assessed on the inbound shipments to Peoria, Ill., and points taking same rates as shown on pages 6 to 9 incl., of tariff, as amended,

Bellaire.....Ohio	Crabtree.....Pa.	Irvineton.....Pa.	Oil City.....Pa.
Belle Vernon.....Pa.	Dunkirk.....N. Y.	Jacobs Creek.....Pa.	Parkersburg.....W. Va.
Bessemer.....Pa.	East Buffalo.....N. Y.	Johnstown.....Pa.	Pittsburgh.....Pa.
Black Rock.....N. Y.	Elizabeth.....Pa.	Leckrone.....Pa.	Point Pleasant..W. Va.
Blairsville.....Pa.	Ellwood City.....Pa.	Masontown.....Pa.	Ravenswood....W. Va.
Bridgeport.....Ohio	Erie.....Pa.	Maxwell.....Pa.	Salamanca.....N. Y.
Brownsville.....Pa.	Fairchance.....Pa.	Monongahela.....Pa.	Suspension Bridge N. Y.
Buffalo.....N. Y.	Gauley Bridge....W. Va.	Moundsville.....W. Va.	Titusville.....Pa.
Charleston.....W. Va.	Grafton.....W. Va.	New Martinsville.W. Va.	Washington.....Pa.
Connellsville.....Pa.	Huntington.....W. Va.	Niagara Falls.....N. Y.	West Newton.....Pa.
Corry.....Pa.	Indiana.....Pa.	North Tonawanda.N. Y.	Wheeling.....W. Va.

and points named on pages 10 to 09 incl., of tariff, as amended, taking same rates or arbitraries higher.

B-4. **Rates on Grain Products bearing reference mark (39) from Peoria, Ill., and points taking same rates as shown on pages 6 to 9 incl., of tariff, as amended,** subject to the provisions of this Note, apply on shipments originating beyond, except will not apply on traffic originating in Trans-Mississippi River Territory (see Note 20, page 76 of tariff), or Northwest Territory (see Note 40, page 84 of tariff, as amended), except as otherwise provided in paragraph B-5 below.

B-5. **Rates on Grain Products from Peoria, Ill., and points taking same rates as shown on pages 6 to 9 incl., of tariff, as amended,** subject to the provisions of this Note, apply on shipments originating at points in Northwest territory and destined to points in the States of Indiana, Michigan and Ohio bearing reference "(1)" on pages 142 to 147 of tariff, as amended, under heading Northwest (see Note 40, page 84 of tariff, as amended).

B-6. **Proportional rate from Kankakee will apply on corn and on the following products in carloads without regard to the existence of single factor joint through rates from** [illegible] **to Kankakee, Ill., to Moreneci, Ill., including but without obligation, such single factor through rates as minima. Combination rates using proportional or resshipping rate from Kankakee on corn and the following products are not subject to Kankakee local rate as minimum:**

Brewers' Flakes (not made from starch).
Brewers' Meal (not made from starch).
Corn Bran,
Corn Chop,
Corn Dust,
Corn Feed (ground, not the product of starch or glucose factories).
Corn Flour,
Corn Meal,
Corn Malt,
Corn Malt Sprouts,
Corn Oil Cake (ground or unground),
Corn Oil Meal,
Corn Screenings (whole or ground),
Corn Skimmings,
Cracked Corn,
Feed, animal or poultry, prepared,
Feed, corn cereal offal (not cereal food preparations and not for human consumption),
Feed, flaked corn, toasted or not toasted (not a cereal food preparation and not for human consumption),
Gluten Feed,
Gluten Feed, sweetened,
Gluten Meal
Grits (not made from starch),
Ground Corn,
Hominy,
Hominy Feed,
Hulled Corn,
Mash, spent grain, dried, without or with not exceeding one per cent (1%) of Vitamin A added.

NOTE A.

Issuing Line or Agent	Tariff	ICC	Item, Index or Reference
AT&SF	7124-K	14627	Items 315, 320, 325, 330, 335 and 340.
CB&Q	G. F. O.1346-U	20241	Rates provided under column P.
C&IM	5-P	B-352	Page 13.
C&NW	G. F. D.17042-D	11209	Rates under column B on pages 34 and 36.
CRI&P	34500-D	C-13411	Item 750.
GM&O	G. F. O.3857-C	238	Item 350.
IC	1537-M	A-11507	Rates bearing reference 5 encircled on pages 40 to 72 incl.
IllT	480-G	A-15	Page 6.
M&StL	1500-J	29	Index Numbers 1155 to 1205 incl.
NYC	701-A	1169	
NYC&StL	G. F. D. 15-W	6117	Index Numbers 1090 to 1185.
PRR	73-E	3311	Item 405.
TP&W	155-A	312	
Wab	19308-E	7745	Items 3300, 3325.

For explanation of reference marks, see last page of this supplement

Underscoring ours. 7950

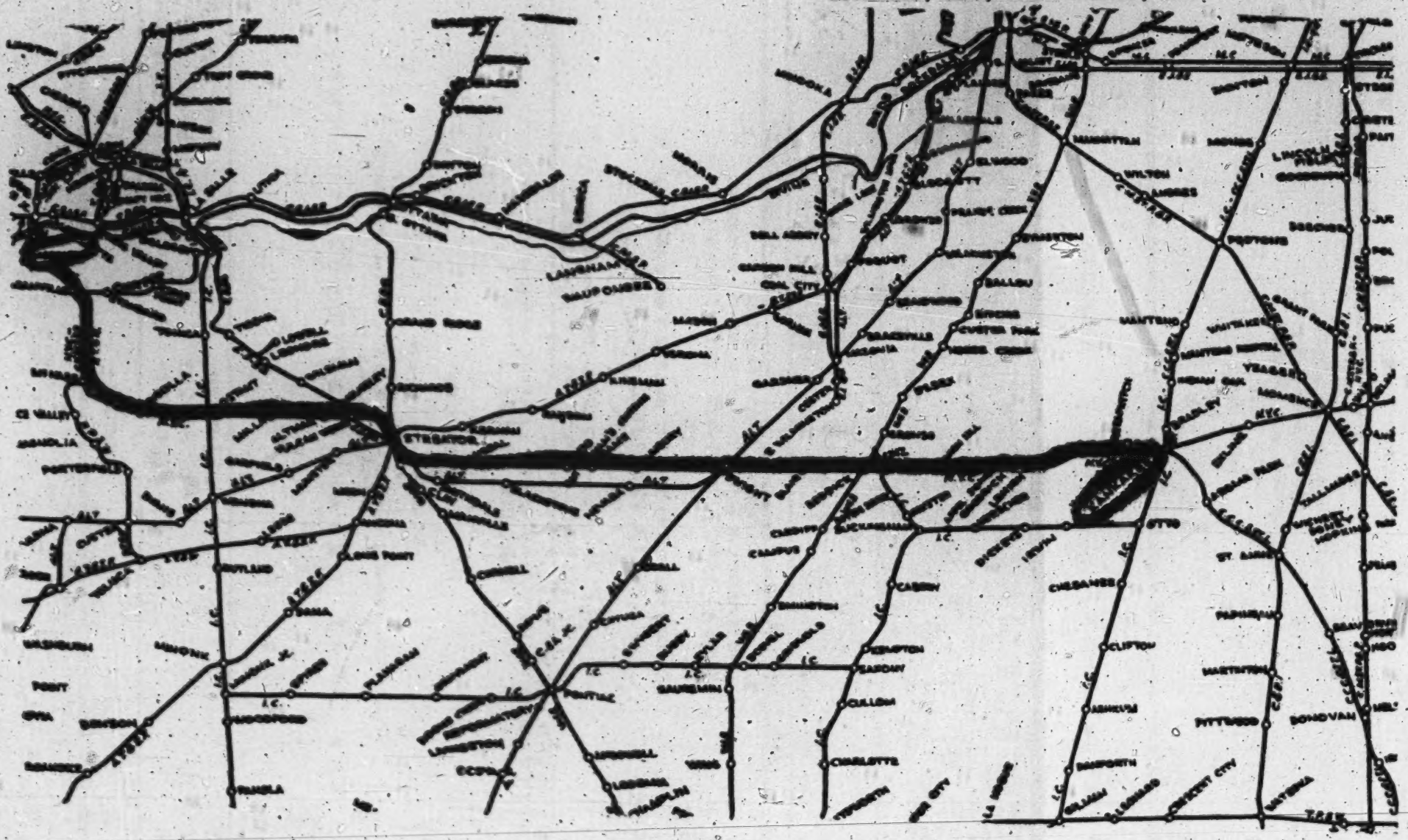
[fol. 188]

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[fol. 182] MAP "B"

MAP "B"

Enlarged Map of New York Central from Moronts, Ill., to Kankakee, Ill.



Sup. 122 to NTC Freight Tariff 701-A

SECTION 3

GRAIN AND GRAIN PRODUCTS: AS PER LISTS REFERRED TO IN RULE 1, PAGE 35 OF TARIFF

For Station FROM which rates apply, see Section 1 of tariff

FROM Station	Rate	Delivering Line	Route	FROM Station	Rate	Delivering Line	Route	FROM Station	Rate	Delivering Line	Route
TO BATTLE CREEK, MICH.											
Page 70 of tariff. ▲ Change:											
NTC 8060	(XD) 11	NTC(M)	1								

SECTION 4

CORN, AS PER GRAIN LIST IN SECTION 1 OF AGENT H.R. HINSCH'S FREIGHT TARIFF 600-H, ICC 4644

FROM	TO	RATE	Delivering Line	Route
Page 591 of tariff and 40 of Sup. 122. ▲ Change:				
Blair.....Ill. Budd.....Ill. Dwight.....Ill. Granville.....Ill. Lehigh.....Ill. Lostant.....Ill. McNabb.....Ill. Mills.....Ill. Missal.....Ill. Moronts.....Ill. Priscilla.....Ill. Reddick.....Ill. Smith Spur.....Ill. Streator.....Ill. Sunburg.....Ill. Union Hill.....Ill. Van's Siding.....Ill.	Kankakee.....Ill.	⊙ (XB) (XD) (XE) 5	NTC(M)	1

EXPLANATION OF REFERENCE MARKS

Reference Mark		EXPLANATION
▲	B	Reduction.
▲	B	Change in wording which results in neither increases nor reductions in charges.
(XD)	B	Not subject to Tariffs of Increased Rates and Charges X-175-C and X-196-A, referred to on title page hereof.
(XD)	C	Rate applies only on Corn and Corn Products, when milled-in-transit, and only as proportional rate to Kankakee, Ill., on traffic destined to Central Territory, and to the Western Termini of Eastern Trunk Lines and East thereof, as defined in Central Territory Railroads Tariff S-J, Agent H.R. Hinsch's ICC 4628. Minimum weight 100,000 pounds. Rates are subject to Transit rules and regulations published in tariffs lawfully on file with the Interstate Commerce Commission.
(XE)	A	Applies only on Grits, Corn (other than bakers', brewers', hominy or groats, also will not apply on Grits, flaked, granulated or refined), in bulk, carloads, minimum weight 100,000 pounds, except when car is loaded to full carrying capacity, actual weight will apply and only when routed via NTC(M) through Schneider, Ind., North Judson, Ind., to South Bend, Ind., thence NTC(M). Also will not apply in connection with the proportional rates named from stations Van's Siding, Ill. (Index 8100), to Moronts, Ill. (Index 8220), inclusive to Kankakee, Ill. on page 591 of tariff, as amended.
(XB)	A	Will not apply from or to intermediate points, see Title Page. Departure from the terms of the amended Fourth Section of the Interstate Commerce Act, is sought under Agent O. E. Schult's Fourth Section Application 3886 of June 28, 1937.
⊙	B	Issued to meet motor truck and water competition.

A-Addition.
B-Brought forward without change.
C-Changes prior explanation of this reference mark in tariff, as amended.

(THE END)

For Explanation of Abbreviations and Notes, see Section 2 of tariff, as amended; Reference Marks, see above.

(MV1245-2)

[fol. 184]

Underscoring ours. 184

Statement of Rates from Kankakee Belt Line of N.Y.C. to Chicago and Kankakee

NYC ORIGINS (Except as noted)		MILES To Kankakee	MILES To Chicago	RATES TO CHICAGO ON CORN (X-206) Intra	Inter	IP	Other		CORN RATES (X-206) To Kankakee, Ill.
Moronts	NYC	83.5	158.4	-	18	24	(1)	24	24
	Milw.	-	144.2	17.5	24	24	(39)	19.5	
Granville	NYC	79.3	154.2	-	18	24	(1)	24	24
	Milw.	-	148.4	17.5	24	24	(39)	19.5	
McNabb		73.4	148.3	23.5	18	24	(1)	24	24
Priscilla		68.6	143.5	-	17.5	24	(1)	24	24
Lostant	NYC	64.4	139.3	-	17.5	24	(1)	24	24
	IC	-	145.0	17	24	24		-	
Milla		60.7	135.6	-	15	24	(1)	24	24
Streator	NYC	51	125.9	-	13.5	24	(1)	24	24
	AT&SF	-	90	13.5	24	24		-	
	CB&Q	-	97.6	13.5	24	24	(45)	17.5	-
	GM&O	-	96.2	13.5	24	24	(45)	17.5	-
Missal		45.7	120.6	20	13.5	20	(1)	20	20
Budd		39.3	114.2	20	12	20	(1)	20	20
Sunbury		34.4	109.3	20	12	20	(1)	20	19.5
Dwight	NYC	29.2	104.1	20	12	20	(1)	20	19.5
	GM&O	-	73.7	10.5	20	20	(45)	17.5	
Blair		23.0	97.9	20	12	20	(1)	20	17.5
Reddick	NYC	20.0	94.9	-	12	20	(1)	20	15
	Wab.	-	66.0	12	20	20		-	
Union Hill		14.6	89.5	20	12	20	(1)	20	15
W. Kankakee		2.0	76.9	20	12	17.5	(1)	17.5	-
Kankakee	IC	-	56.0	12	17.5	17.5		-	-
	NYC	-	74.9	20	12	17.5	(1)	17.5	

[fol. 185]

(39) Applies only on corn and only when outbound shipments forwarded to CTR-T.L. and NEFA-Sou. etc. Where this reference appears the rate shown under "IP" column does not apply on corn.

(1) Applies only on corn and only on traffic destined beyond Chicago by rail.

(45) Applies only on corn when destined to territory where no thru one factor rate in effect.

TARIFF AUTHORITY: NYC Tariff 701-A, I.C.C. 1169-NYC Tariff 2801, I.C.C. 1536

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SUPPLEMENT
TO

C. T. C. 2171
H. R. Hinsch, Agent

Mich. P. S. C. 771
H. R. Hinsch, Agent

I. C. C. 4460
H. R. Hinsch, Agent

Ind. R. C. D-863
H. R. Hinsch, Agent

I. C. C. A-3941
W. J. Prueter, Agent

CENTRAL TERRITORY RAILROADS
TARIFF BUREAU
(H. R. Hinsch, Agent)

SUPPLEMENT 38
TO
FREIGHT TARIFF 535-C
Cancels Supplement 37

Supplements 3, 26, 36 and 38 contain all changes.

PROPORTIONAL RATES
APPLYING ON
GRAIN AND GRAIN PRODUCTS
CARLOADS

FROM			TO Stations in	
CAIRO, ILL.	EAST ST. LOUIS, ILL.	MANITOWOC, WIS.	INDIANA	OHIO
CHICAGO, ILL.		MENOMINEE, MICH.	KENTUCKY	PENNSYLVANIA
EAST JOLIET, ILL.	GALE, ILL.		MICHIGAN	WEST VIRGINIA
EAST ST. MADISON, ILL.	KANKAKEE, ILL., KEWAUNEE, WIS.	MICHIGAN CITY, IND.	NEW YORK	
EAST HANNIBAL, ILL.	MACKINAW CITY, MICH.	MILWAUKEE, WIS. PEORIA, ILL.	named on pages 10 to 69 incl., of tariff, as amended	
EAST KEOKUK, ILL.	MANISTIQUE, MICH.	QUINCY, ILL. ST. LOUIS, MO. THEBES, ILL.		
and other points named on pages 6 to 9 incl., of tariff, as amended				

Governed, except as otherwise provided herein, by Official Classification 65, I. C. C.-O. C. 65, Mich. P. S. C.-O. C. 65, W. S. Flint, Agent; by exceptions thereto, Tariff 130-C, I. C. C. 3026, Mich. P. S. C. 675, issued by H. R. Hinsch, Agent, and by supplements thereto or successive issues of said publications.

ISSUED NOVEMBER 7, 1956 **EFFECTIVE DECEMBER 15, 1956**

W. J. PRUETER, Agent,
818 W. Jackson Blvd.,
Chicago 6, Ill.

Issued by
H. R. HINSCH, Agent,
23 West Madison Street,
Chicago 2, Ill.

[fol. 186]

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EXPLANATION OF NOTES

Note 45 Cancels Note 45 pages 2 and 3 of Supplement 37.

APPLICATION OF RESHIPPING OR PROPORTIONAL RATES APPLICABLE ON TRAFFIC ORIGINATING AT POINTS IN THE TERRITORY AS DESCRIBED BELOW

Where reference is made to this Note rates will apply as follows:

Rates subject to the provisions of this Note are reshipping or proportional rates applicable on traffic reaching the reshipping point via a rail or water transportation line that can furnish to the outbound carrier freight bill or like documentary evidence as to the origin of the traffic and rate paid to the reshipping point, and will only apply on such traffic when originating at points in the territory as described below, from which no single factor through commodity rates are in effect in connection with inbound carrier via the reshipping point, from original shipping point to final destination; provided that in no case shall the combination through rate to and from the reshipping point be less than the local rate from the reshipping point to final destination nor less than the through joint rate in effect on the commodity reforwarded from the reshipping point from origin point of the grain to final destination of the grain or grain products via any route, whichever may be the higher, the difference, if necessary, to protect either of the above bases of rates as minima to be added to the reshipping or proportional rate from the reshipping point. (See Exception.)

On shipments which arrive by River or Canal at Chicago, Pekin or Peoria, Ill. These rates are applicable as of the date shipments leave the point of origin as shown on the shipping directions surrendered at Chicago, Pekin or Peoria, Ill.

These rates are subject to transit rules and regulations published in tariffs on file with the Interstate Commerce Commission.

Rates also apply on through billed shipments originating at points in territory as described in this Note, not stopped in transit at reshipping points subject to this application.

Exception.—**The foregoing provisions as to the application of local rates or the rate from the origin point to final destination as minima will not apply on shipments arriving at Chicago, Pekin or Peoria, Ill., by River or Canal, nor on shipments of corn or corn products as enumerated in B-6 arriving at Kankakee, Ill.; by NYC from NYC Stations West Kankakee, Ill., to Moronts, Ill. (Station Numbers 8030 to 8220).**

A-1. **Rates on Grain from Chicago, Ill., East Joliet, Ill., Kankakee, Ill., Kewaunee, Wis., Manistique, Mich., Manitowoc, Wis., Menominee, Mich., and Milwaukee, Wis., and points taking same rates as shown on pages 6 to 9 incl., of tariff, as amended, subject to the provisions of this Note, apply on shipments of Grain when originating at points beyond. Will not apply on traffic originating in Trans-Mississippi River or Northwest Territories (for description, see Notes 20 and 40, pages 76 and 84 of tariff, as amended).**

A-2. **Rates on Grain Products from Chicago, Ill., East Joliet, Ill., Kankakee, Ill., Kewaunee, Wis., Manistique, Mich., Manitowoc, Wis., Menominee, Mich., Milwaukee, Wis., and points taking same rates as shown on pages 6 to 9 incl., of tariff, as amended, subject to the provisions of this Note, apply on shipments of Grain Products originating beyond. Will not apply on traffic originating in Trans-Mississippi River or Northwest Territories (for description, see Notes 20 and 40, pages 76 and 84 of tariff, as amended).**

B-1. **Rates on Grain from Peoria, Ill., and points taking same rates as shown on pages 6 to 9 incl., of tariff, as amended, (except as provided in paragraph B-2 hereof), subject to the provisions of this Note, apply on shipments of Grain when originating at points beyond. Will not apply on traffic originating in Trans-Mississippi or Northwest Territories (for description, see Notes 20 and 40, pages 76 and 84 of tariff, as amended).**

B-2. **Rates on Grain from Peoria, Ill., subject to the provisions of this Note will apply from Peoria, Bloomington, Crescent, Pekin, South Bartonville and Springfield, Ill., only as follows:**

(a) **As proportional or reshipping rates on shipments originating at stations shown in tariffs named in Note A page 87 of tariff, as amended, from which proportional rates are published to Peoria, Bloomington, Crescent, Pekin, South Bartonville or Springfield, Ill., and only when such proportional rates are assessed into Peoria, Bloomington, Crescent, Pekin, South Bartonville or Springfield, Ill., and when the grain is destined to the following points:**

Bellaire	Ohio	Crabtree	Pa.	Irvineton	Pa.	Oil City	Pa.
Belle Vernon	Pa.	Dunkirk	N. Y.	Jacobs Creek	Pa.	Parkersburg	W. Va.
Bessemer	Pa.	East Buffalo	N. Y.	Johnstown	Pa.	Pittsburgh	Pa.
Black Rock	N. Y.	Elisabeth	Pa.	Leckrone	Pa.	Point Pleasant	W. Va.
Blairsville	Pa.	Ellwood City	Pa.	Masontown	Pa.	Ravenswood	W. Va.
Bridgeport	Ohio	Erie	Pa.	Maxwell	Pa.	Salamanca	N. Y.
Brownsville	Pa.	Fairchance	Pa.	Monongahela	Pa.	Suspension Bridge	N. Y.
Buffalo	N. Y.	Gauley Bridge	W. Va.	Moundsville	W. Va.	Titusville	Pa.
Charleston	W. Va.	Grafton	W. Va.	New Martinsville	W. Va.	Washington	Pa.
Connellsville	Pa.	Huntington	W. Va.	Niagara Falls	N. Y.	West Newton	Pa.
Corry	Pa.	Indiana	Pa.	North Tonawanda	N. Y.	Wheeling	W. Va.

and points named on pages 10 to 69 incl., of tariff, as amended, taking same rates or arbitraries higher.

(b) **As proportional or reshipping rates on shipments originating at points beyond, except will not apply on traffic originating in Trans-Mississippi River Territory (see Note 20, page 76 of tariff), Northwest Territory (see Note 40, page 84 of tariff, as amended), or traffic covered by paragraph (a) Section B-2 of this Note.**

(Concluded on following page)

For explanation of reference marks, see last page of this supplement.

Underscoring ours.

[fol. 187]

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[fol. 189]

BEFORE THE INTERSTATE COMMERCE COMMISSION

PROTEST AND PETITION OF NORRIS GRAIN COMPANY FOR SUSPENSION—Filed July 18, 1957

Mr. Harold D. McCoy, Secretary,
Interstate Commerce Commission,
Washington 25, D. C.

Dear Sir:

The Norris Grain Company of Chicago, Illinois respectfully protests the following proposed tariff published to become effective July 30, 1957 and petitions the Commission to postpone the effective date thereof and suspend the operation of said schedule, and to enter upon an investigation into and concerning the reasonableness thereof:

Supplement 126 to New York Central Railroad Company
Tariff 701-A-ICC-1169

In support of its protest the petitioner shows:

I

This petition is made in behalf of the Norris Grain Company, a corporation existing by and under the laws of the State of Illinois with headquarters at 141 W. Jackson Blvd., Chicago 4, Illinois. We own and operate two grain elevators in that city with a combined capacity of 4,950,000 bushels. We are and have been engaged in the selling, buying, storing and handling of grain since 1908. As such we are vitally interested in rates that affect the movement of grain which originates in Illinois, particularly corn in the instance case, and is destined to points in Central Freight Association Territory.

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II

The New York Central's aim in Supplement 126 to their Tariff 701-A-ICC-1169 here protested, is to reduce the rates on Corn Products from origins on the New York Central's Kankakee Belt Line, Moronts, Illinois to Van Siding, Illinois when destined to Central Territory. This

is being done in order that they might meet truck-barge competition to Central Territory from the same origin territory. For the purpose of clarification this petition is being directed at the addition of Central Territory to Circle Reference 400, Page 2 of Supplement 126, NYC-701-A. The New York Central in publishing a 5 cent per hundred pound rate (5½ cents including X-206 Increase) to Kankakee, Illinois on Corn and Corn Products when milled in transit and destined to Central Territory has not only met their competition but has gone far below it. This has been done because of the manner in which the New York Central arrived at their competitors' rates. They took only the barge rate to Chicago, Illinois, plus the proportional rate beyond to Central Territory as the scale with which they were to compete. We feel this is not a fair or just measure of the transportation costs to Chicago via barge since the New York Central has failed to consider the cost of trucking from the farm or country elevator to the river port; the elevation thereat; the trimming and shoveling at Chicago. From this one would surmise the New York Central thinks this corn arrives and is handled at the river port free; this of course, is not true. Although the costs referred to above are not part of the [fol. 191] published barge rate to Chicago, they must be considered as part of the total transportation costs absorbed. Without giving due consideration to all the costs incurred in a truck-barge rail movement, the New York Central has created a level of rates low enough not only to divert all this traffic from the barge lines but have been successful in drawing most of the corn away from several western railroads which operate in the same area. This of course, is in direct violation of the National Transportation Policy which prohibits unfair or destructive competitive practices.

III

If this level of rates is permitted to become effective without all interested parties being able to present the factual data necessary to prove the tremendous effect which would result from the establishment of these rates, it would have not only a crippling effect upon the competi-

tive modes of transportation and a like transportation as well, but would also create a market, namely Kankakee which for years has been equal in rate structure to Chicago, with privileges unobtainable at Chicago. In conclusion your petitioner is of the opinion that rail carriers should have the opportunity of meeting their competition, but meeting it at a level of rates which would not result in violations of the National Transportation Policy and the Interstate Commerce Act.

We would here have it known that we join in the petition filed by the Transportation Department of the Chicago Board of Trade of which we are a member. Time has not permitted our gathering the necessary data to show the direct impact these rates would have on the Norris Grain Company. We therefore respectfully request that public hearing be held in order that all interested parties might be heard.

[fol. 192] **Prayer**

Wherefore, the petitioner prays that the tariff schedule herein protested be suspended, the effective date thereof postponed, and its application be deferred pending an investigation into and concerning the lawfulness thereof. Also, that a hearing be assigned on this matter at Chicago, Illinois for the convenience of all interested parties.

Respectfully submitted,

Norris Grain Company, V. M. Conley, Manager of Transportation, 141 W. Jackson Boulevard, Chicago 4, Illinois.

Dated at: Chicago, Illinois, July 17, 1957.

Certificate of Service (omitted in printing).

[fol. 193] *Duly sworn to by Lee H. Wagner, jurat omitted in printing.*

[fol. 194]

BEFORE THE INTERSTATE COMMERCE COMMISSION

PETITION OF EMINGTON GRAIN COMPANY, ET AL. FOR SUSPENSION OF TARIFF—Filed July 18, 1957

Tariff Reference:

Supp. No. 126, N.Y.C. Tariff No. 701-A, R. T. Waite, I.C.C. No. 1169, Page No. 2; Supp. 84, H. R. Hinsch's Tariff 245-H, I.C.C. No. 4403; Supp. 38, H. R. Hinsch's Tariff 535-C, I.C.C. No. 4499

Effective Date:

July 30, 1957

Commodity:

Corn and Corn Products

From:

Points on New York Central Railroad west of Kankakee, Illinois

To:

Kankakee, Illinois for Transit to destinations in Central, Trunkline, and New England Territories

Rate:

Proportional of 5¢ (subject to Ex Parte 206), plus proportionals to eastern destinations

Emington Grain Company, Bookwalter Grain Company, Cullom Cooperative Grain Company, Dale P. Walsh, Charles Treasure, Griswold Grain Company, Mazon Farmers Elevator, By: Edward B. Hayes, Registered Practitioner.

135 South La Salle Street
Chicago 3, Illinois

[fol. 195]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Petition for Suspension of Tariff

Come now your Petitioners, Emington Grain Company, Bookwalter Grain Company, Cullom Cooperative Grain Company, Dale P. Walsh, Charles Treasure, Griswold Grain Company, and Mazon Grain Company, and respectfully petition that Supplement No. 126, New York Central Railroad Company Tariff 701-A, I.C.C. No. 1169, filed by Agent R. T. Waite to become effective July 30, 1957, be suspended and set for hearing for the reason that said supplement contains Fourth Section departures which have not been authorized by this Commission and for the reasons shown in the Protest against Application For Fourth Section Relief, which is attached hereto and made a part hereof.

Petitioners further request that Section 4, Supplement No. 122, New York Central Tariff 701-A, I.C.C. No. 1169, and the provisions for the non-application of through rates from New York Central Railroad stations west of Kankakee, Illinois, to Central, Trunk Line, and New England Territories in Agent H. R. Hinsch's Tariffs 245-H and 535-C, I.C.C. Nos. 4403 and 4499, be cancelled and that [fol. 196] the Commission otherwise restore the rate schedules with respect to these points in effect prior to December 15, 1956, because it is admitted in the Fourth Section Application, I.C.C. No. 33955, that said supplements promulgate rates which are illegal in that they create Fourth Section departures for which this Commission has not given its authorization.

Respectfully submitted,

Emington Grain Company, Bookwalter Grain Company, Cullom Cooperative Grain Company, Dale P. Walsh, Charles Treasure, Griswold Grain Company, Mazon Farmers Elevator, By: Edward B. Hayes, Registered Practitioner.

135 South La Salle Street
Chicago 3, Illinois

July 17, 1957

[fol. 197]

BEFORE THE INTERSTATE COMMERCE COMMISSION

PROTEST BY EMINGTON GRAIN COMPANY, ET AL. AGAINST APPLICATION FOR FOURTH SECTION RELIEF—Dated July 17, 1957

Tariff Reference:

Supp. No. 126, N.Y.C. Tariff No. 701-A, R. T. Waite, I.C.C. No. 1169, Page No. 2; Supp. 84, H. R. Hinsch's Tariff 245-H, I.C.C. No. 4403; Supp. 38, H. R. Hinsch's Tariff 535-C, I.C.C. No. 4499

Commodity:

Corn and Corn Products

From:

Points on New York Central Railroad west of Kankakee, Illinois

To:

Kankakee, Illinois for Transit to destinations in Central, Trunkline, and New England Territories

Rate:

Proportional of 5¢ (subject to Ex Parte 206), plus proportionals to eastern destinations

Emington Grain Company, Bookwalter Grain Company, Cullom Cooperative Grain Company, Dale P. Walsh, Charles Treasure, Griswold Grain Company, Mazon Farmers Elevator, By: Edward B. Hayes, Registered Practitioner.

135 South LaSalle Street
Chicago 3, Illinois

[fol. 198]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Protest Against Application for Fourth Section Relief

Protestants, Emington Grain Company, Bockwalter Grain Company, Cullom Cooperative Grain Company, Dale P. Walsh, Charles Treasure, Griswold Grain Company, and Mazon Farmers Elevator, respectfully protest against the Application for Fourth Section Relief, I.C.C. No. 33955, E. R. No. 2386, filed by the Traffic Executive Association-Eastern Railroads in connection with Supplement No. 126, New York Central Railroad Tariff No. 701-A, I.C.C. No. 1169, and in support of their protest show the following:

I. Protestants are operators of grain elevators in central Illinois, located on railroads other than the New York Central Railroad, as follows:

Name	Location	Served By
Emington Grain Company	Emington	Wabash R.R.
Bockwalter Grain Company	Essex	Wabash R.R.
Cullom Cooperative Grain Company	Cullom	Illinois Central R.R.
Dale P. Walsh	Campus	Wabash R.R.
Charles Treasure	Gardner	Gulf, Mobile & Ohio R.R.
Griswold Grain Company	Cullom	Illinois Central R.R.
Mazon Farmers Elevator	Mazon	Atcheson, Topeka & Santa Fe Ry.

[fol. 199] The highway distances of the locations of protestants' elevators from the nearest New York Central Railroad station west of Kankakee, Illinois are as follows:

Protestant's Location	Nearest N.Y.C. Station	Highway Distance
Emington	Dwight	11 Miles
Essex	Union Hill	6 Miles
Cullom	Reddick	19 Miles
Campus	Reddick	8 Miles
Gardner	Dwight	10 Miles
Mazon	Dwight	10 Miles

II. Supplement No. 126 to New York Central Railroad Tariff No. 701-A, I.C.C. No. 1169, Page No. 2, is designed to establish and maintain a proportional rate of 5¢ per cwt. (subject to Ex Parte 206) for corn and corn products from points on the New York Central Railroad west of Kankakee, Illinois to Kankakee, Illinois in transit to destinations in Central, Trunkline, and New England Territories at the proportionals established for many years from Kankakee, Illinois to these points. Related changes here protested were made effective December 15, 1956, in Supplement 84 to Agent H. R. Hinsch's Tariff 245-H, I.C.C. No. 4403, and Supplement 38 to Agent H. R. Hinsch's Tariff 535-C, I.C.C. No. 4499, to permit the combination of the proportionals into aggregate rates to the eastern destinations without protecting the local rate from Kankakee, even though the [fol. 200] combination was lower than the local rate from Kankakee and from points in Indiana. It is admitted by the railroads that the aggregates of these proportional rates will constitute departures from the Fourth Section and in Fourth Section Application, I.C.C. No. 33955, E.R. No. 2386, the approval of the Commission is sought for these departures.

III. The 5½¢ rate presently is in effect under Section 4 of Supplement 122 to NYC Tariff No. 701-A, except that it is not under that supplement available for shipments destined to points in Central Territory. The rates originally were filed under Supplement No. 114, which became effective December 15, 1956. Subsequently Supplement No. 120 was filed to exclude their application to shipments routed via Chicago. Before it became effective, however, Supplement No. 120 was superseded by Supplement No. 121, in

order to make the rate again available for shipments routed via Chicago. Supplement No. 122 later replaced Supplement No. 121. It is admitted in the application for Fourth Section Relief filed herein that all these supplements contain or contained Fourth Section departures and that the Interstate Commerce Commission has not granted any authorization for such departures. All such supplements, including Supplement No. 122 presently in effect, therefore were promulgated in violation of Section 4 of the Interstate [fol. 201] Commerce Act and the rate promulgated therein was and is illegal. Supplements No. 122 to NYC Tariff 701-A, 84 to H. R. Hinsch's Tariff 245-H, and 38 to H. R. Hinsch's Tariff 534-C should therefore be withdrawn and the rates in effect prior to December 15, 1956, subject to Ex Parte 206, should be restored, pending hearing on Fourth Section Application No. 33955. The Commission has plenary power under Section 15(1) to order such action by the respondent railroads where the violation of the Act is admitted as it is here, and the Commission is hereby requested to enter such an order.

IV. The 5½¢ rate for which approval is sought in said Fourth Section Application No. 33955 has disrupted the long standing freight rate scale of the railroads serving this area and is disrupting the marketing pattern of corn in the areas served by protestants' elevators. This disruption has resulted in a diversion to elevators on the New York Central of much of the corn which prior to December 15, 1956, normally came to protestants' elevators, and is discriminatory against protestants in violation of Section 3(1) of the Interstate Commerce Act. Only by a restoration of the rates on corn and corn products in effect from the New York Central stations west of Kankakee to Kankakee prior to December 15, 1956, subject to Ex Parte 206, can the freight rate structure be restored and further injury to protestants and other similarly situated elevator operators be [fol. 202] avoided. No other alternative appears feasible nor desirable since a uniform reduction of rates to the level established by the New York Central by all railroads serving the area would create an abnormally depressed rate structure which the New York Central does not allege would

be compensatory to itself, and which would not be compensatory to it or to the other railroads involved. If the former rate structure is not restored, a disorderly rate war among the railroads involved aimed at recovery of traffic lost to rate-cutting competitors appears likely to result, with resulting injury to shippers and railroads alike.

Wherefore, protestants pray that the above application be set for hearing in Chicago, Illinois, and that pending entry of a final order in this proceeding by the Commission, the Relief Carriers be ordered to cease and desist from exacting the rate specified in Sec. 4, Supp. 122, NYC Tariff 701-A, I.C.C. No. 1169, to restore the Kankakee local rate as the minimum for combinations of proportional rates across Kankakee, and otherwise to restore the rates for the points specified in such Section 4 as they existed prior to December 15, 1956, subject to increases in Ex Parte 206, by cancellation of:

(1) All rates on Corn to Kankakee, Illinois, originally established in Section 4, Page 3, Supplement 114, New York Central Railroad Company Freight Tariff 701-A, I.C.C. 1169.

[fol. 203] (2) All rates on Corn to Kankakee, Illinois, published in Section 4, Page 40, Supplement 122, New York Central Railroad Company Freight Tariff 701-A, I.C.C. 1169, which is a re-issue of the rates covered by paragraph (1).

(3) Item 279 (new) and the concluding part of the Exception in Note 20, which refers to Item 279, all on Page 2, Supplement 84, Central Territory Railroads Tariff Bureau Freight Tariff 245-H, I.C.C. 4403, which originally became effective December 15, 1956.

(4) Item 279 on Page 17 and the concluding part of the Exception in Note 20, which refers to Item 279 on Page 11, both in Supplement 93, Central Territory Railroads Tariff Bureau Freight Tariff 245-H, I.C.C. 4403, which is a re-issue of the provisions of paragraph (3).

(5) Paragraph B-6 of Exceptions to Note 45, shown on Page 4, Supplement 38, Central Territory Railroads Tariff

Bureau Freight Tariff 535-C, I.C.C. 4499, originally effective December 15, 1956 and still in effect.

Respectfully submitted,

Emington Grain Company, Bookwalter Grain Company, Cullom Cooperative Grain Company, Dale P. Walsh, Charles Treasure, Griswold Grain Company, Mazon Farmers Elevator, By: Edward B. Hayes, Registered Practitioner.

135 South LaSalle Street,
Chicago 3, Illinois,
July 17, 1957.

[fol. 204] Certificate of service (omitted in printing).

[fol. 205]

BEFORE THE INTERSTATE COMMERCE COMMISSION

PETITION OF A. L. MECHLING BARGE LINES, INC.—
Filed July 18, 1957

Tariff Reference: Supp. No. 126, N.Y.C. Tariff No. 701-A, R. T. Waite, I.C.C. No. 1169, Page No. 2; Supp. 84, H. R. Hinsch's Tariff 245-H, I.C.C. No. 4403; Supp. 38, H. R. Hinsch's Tariff 535-C, I.C.C. No. 4499

Effective Date: July 30, 1957

Commodity: Corn and Corn Products

From: Points on New York Central Railroad west of Kankakee, Illinois

To: Kankakee, Illinois for Transit to destinations in Central, Trunkline, and New England Territories

Rate: Proportional of 5¢ (subject to Ex Parte 206), plus proportionals to eastern destinations

A. L. Mechling Barge Lines Inc., By: Edward B. Hayes, Registered Practitioner.

135 South La Salle Street
Chicago 3, Illinois

[fol. 206]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Petition for Suspension of Tariff

Comes now your Petitioner, A. L. Mechling Barge Lines Inc., and respectfully petitions that Supplement No. 126, New York Central Railroad Company Tariff 701-A, I.C.C. No. 1169, filed by Agent R. T. Waite to become effective July 30, 1957, be suspended and set for hearing for the reason that said supplement contains Fourth Section departures which have not been authorized by this Commission and for the reasons shown in the Protest against Application For Fourth Section Relief, which is attached hereto and made a part hereof.

Petitioner further requests that Section 4, Supplement No. 122, New York Central Tariff 701-A, I.C.C. No. 1169, and the provisions for the non-application of through rates from New York Central Railroad stations west of Kankakee, Illinois, to Central, Trunk Line, and New England Territories in Agent H. R. Hinsch's Tariffs 245-H and 535-C, I.C.C. Nos. 4403 and 4499, be cancelled and that the Com-
[fol. 207] mission otherwise restore the rate schedules with respect to these points in effect prior to December 15, 1956, because it is admitted in the Fourth Section Application, I.C.C. No. 33955, that said supplements promulgate rates which are illegal in that they create Fourth Section departures for which this Commission has not given its authorization.

Respectfully submitted,

A. L. Mechling Barge Lines Inc., By: Edward B. Hayes, Registered Practitioner.

135 South LaSalle Street
Chicago 3, Illinois

[fol. 208]

BEFORE THE INTERSTATE COMMERCE COMMISSION

PETITION OF ILLINOIS GRAIN CORPORATION FOR SUSPENSION—
Filed July 22, 1957

Mr. Harold D. McCoy, Secretary
Interstate Commerce Commission
Washington 25, D. C.

Dear Sir:

Comes now your petitioner, Illinois Grain Corporation, 141 West Jackson Boulevard, Chicago (4), Illinois. The Illinois Grain Corporation is a corporation organized under the laws of the state of Illinois and is affiliated with the Illinois Agricultural Association which is the state Farm Bureau in Illinois with approximately 195,000 farm families.

The Illinois Grain Corporation operates a 6,500,000 bushel terminal elevator in the Lake Calumet Harbor at Chicago, Illinois. It owns and operates four elevators on the Illinois River and one elevator in Illinois on the upper Mississippi River and one elevator at Tampa, Florida. It has a membership of 159 farmer cooperative elevators in Illinois who own stock in the corporation. Its purpose is to buy and sell grain for its members.

I

That this petitioner respectfully requests that the Interstate Commerce Commission suspend Supplement No. 126 to NYC Tariff No. 701-A ICC No. 1169 scheduled to become effective July 30, 1957.

[fol. 209] This petitioner supports the petition for suspension filed by the Board of Trade of the City of Chicago and further states that Supplement No. 126 here protested involves the movement of corn products from origins in Illinois located on the New York Central's Kankakee Belt Line from Morotts, Illinois to Van's Siding, Illinois, ultimately destined to points in the Central Freight Association

Territory. While page 2 of Supplement No. 126 opposite the circle 400 reference mark shows the application of rates other than the Central Freight Association Territory, this petition of suspension is directed solely to the addition of Central Territory as underscored thereon, denoting an extension of its application to the Central Freight Association Territory. The purpose of the proposed rate is to meet truck and barge competition from the same origin territory to the Central Freight Association Territory which presently moves on an aggregate of charges including: Trucking from farm or country elevator to the river port; elevation thereat; the barge rate to Chicago; the established rail proportional rate from Chicago to the final destination in Central Freight Association Territory. An examination should be made of all costs incurred in the movement. No such costs have been submitted by the New York Central. They should be required to submit such costs.

II

That Supplement 126 to New York Central, Tariff No. 701-A ICC No. 1169 was issued on June 28, 1957 to become effective July 30, 1957 without observance of approved Rules of Procedure required by Section 5a of the Interstate Commerce Act.

The traffic matters contained in Supplement No. 126 to NYC Tariff 701-A scheduled to become effective July 30, 1957 were:

[fol. 210] 1. Without a written proposal that shippers or other interested parties could examine.

2. Without public notice of any description.

3. Without opportunity for shippers or other interested parties to request and participate in a public hearing.

III

That the proposed rates prevent the application of the reduced level of rates from applying on whole corn, resulting in unjust discrimination against that particular type of traffic under Section 3 of the Interstate Commerce Act.

The rates apply only on corn milled at some intermediate milling point and reshipped as corn products.

IV

That the proposed rates create a large area east and south of Kankakee, Illinois in which the carriers are seeking relief under the Fourth Section of the Interstate Commerce Act in Petition No. 33955 resulting in higher rates and causing unjust discrimination in said area.

V

In conclusion petitioner believes that opportunity should be given to shippers to present to the Commission evidence which will show that the proposed rates are unjust and unreasonable, in violation of Section 1 and that if permitted to become effective will be prejudicial and discriminatory to protestant, Illinois Grain Corporation and its various elevator facilities and preferential of other parties and elevator facilities who are so located as to enjoy the use of the preferential rates, in violation of Section 3.

Wherefore, the petitioner prays that the tariff schedule herein protested be suspended, the effective date postponed [fol. 211] and its application be deferred pending an investigation into and concerning the lawfulness thereof, and petitioner further requests that hearing be assigned to Chicago, Illinois for convenience of parties affected.

Respectfully submitted,

Illinois Grain Corporation, By Thomas J. Crowe, Vice President and Traffic Manager.

Certificate of service (omitted in printing).

Dated at: Chicago, Illinois, July 16, 1957.

[fol. 212]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Commission's No. 33955
E.R. No. 2386

June 28, 1957

File: C1301-383

FOURTH SECTION APPLICATION BY TRAFFIC EXECUTIVE ASSOCIATION—EASTERN RAILROADS—Filed June 27, 1957

To the INTERSTATE COMMERCE COMMISSION
Washington 25, D.C.

O. E. Schultz, Vice Chairman, Traffic Executive Association-Eastern Railroads, for and on behalf of carriers parties to Agent H. R. Hinsch's Tariff No. 245-H, ICC No. 4403 and No. 535-C, ICC No. 4499, as well as New York Central Railroad Tariff No. 701-A, ICC No. 1169, insofar as they participate in the traffic herein involved, hereby respectfully petition the Interstate Commerce Commission for authority to maintain the rates hereinafter set forth without observing the long-and-short-haul provision of Section 4(1) of the Interstate Commerce Act, as amended.

The rates for which relief is herein sought were initially published in Supplement 114 to NYC Tariff 701-A, ICC 1169, with corresponding necessary amendments in Supplement 84 to Agent H. R. Hinsch's Tariff 245-H, ICC No. 4403, and Supplement 38 to Agent H. R. Hinsch's Tariff 535-C, ICC 4499, on traffic destined to western termini and east thereof and became effective December 15, 1956, while on traffic to Central Territory the rates have been published to become effective July 30, 1957 in Supplement No. 126 to NYC Tariff 701-A, ICC No. 1169, to apply in conjunction with rates published in Agent H. R. Hinsch's Tariff 535-C, I.C.C. No. 4499.

[fol. 213] I

It is proposed to continue, establish and maintain for interstate application a 5-cent proportional rate, subject to Ex Parte 206, (currently 5½ cents) on corn and corn products, minimum weight 100,000 pounds, via NYC(W) direct,

From:	Van's Siding,	Ill.
	Lehigh,	Ill.
	Union Hill,	Ill.
	Reddick,	Ill.
	Blair,	Ill.
	Dwight,	Ill.
	Smith Spur,	Ill.
	Sunbury,	Ill.
	Budd,	Ill.
	Missal,	Ill.
	Streator,	Ill.
	Milla,	Ill.
	Lostant,	Ill.
	Priscilla,	Ill.
	McNabb,	Ill.
	Granville,	Ill.
	Moronts,	Ill.
To:	Kankakee,	Ill.

for application on traffic destined ultimately to Central Freight Territory, Western Termini of Eastern Trunk Lines in the States of New York, Pennsylvania and West Virginia and points east thereof in Trunk Line Territory and New England Territory as defined in Agent H. R. Hinsch's 3-I, I.C.C. No. 4175, on basis of aggregate of intermediate rates reflecting proportional rates to and from Kankakee named in NYC Tariff 701-A, I.C.C. No. 1164, Agent H. R. Hinsch's Tariffs 245-H and 535-C, I.C.C. Nos. 4403 and 4499 respectively.

Provisions have also been made for the non-application of through rates from these stations where the combination of the 5½ cent proportional rate to Kankakee and the re-shipping rate from Kankakee is lower via all routes of carriers parties to Agent H. R. Hinsch's Tariff 245-H and 535-C, ICC Nos. 4403 and 4499, respectively.

[fol. 214] II

The proportional rate of 5½ cents from the Illinois points involved herein to Kankakee is published subject to Rule 27 at origin and destination and conforms to the

Fourth Section of the Act. The proportional rates published from Kankakee and likewise from Chicago to destinations in Central, Trunk Line and New England Territories in Agent H. R. Hinsch's Tariffs ICC Nos. 4403 and 4499 are protected by outstanding fourth section relief afforded by Fourth Section Order Nos. 12044, 13247, 13691, 16803, 18407, et al. Therefore, no unprotected departures occur in either factor of the combination here involved,

When the 5½-cent proportional rate referred to herein to Kankakee, as published in NYC Tariff 701-A, ICC No. 1169, is added to the reshipping rates applicable from Kankakee, which are the same as from Chicago, to the involved destination territory published in Agent H. R. Hinsch's Tariffs 535-C, ICC No. 4499 and 245-H, ICC No. 4403, they produce through combination rates which are lower than the local or flat rates applicable from Kankakee and stations east, north and south thereof located along routes of eastern lines to the extent that they participate in the involved tariffs to points in the destination territory referred to, in which instances, unauthorized departures occur due to higher local rates from intermediate points, and additional relief appears necessary.

Exhibit No. 1, attached hereto and made a part hereof, is a statement showing typical examples of fourth section departures via representative direct and indirect routes. This exhibit shows information as to rates, mileages, earnings and other data required by the Commission's Rules of Practice.

[fol. 215] Exhibit No. 2, attached hereto and made a part hereof, is a map showing the origin stations and departure routes shown on Exhibit No. 1. The color scheme used on this map is fully explained on the fly-leaf attachment.

Exhibit No. 3, attached hereto and made a part hereof, is a statement of Average Revenues and Expenses for the Class I Railways of the Eastern District for the year 1955.

III

This application is based on the following facts which present all of the circumstances and conditions relied upon by your petitioner in justification of the relief herein sought.

The New York Central Railroad stations from which the 5½-cent proportional rate to Kankakee will apply are located in close proximity to the Illinois River as shown in Exhibit No. 4, attached hereto and made a part hereof.

The barge rates on corn from the river points (other than the origins involved herein) to Chicago are shown on Exhibit No. 5, attached hereto and made a part hereof. This exhibit also shows the rail origins here involved and the truck distance to the river barge points.

As a direct result of the low barge rates to Chicago, corn demands a more favorable price at the river points as compared with the price at interior elevators. Consequently, even though there are local elevators at the involved origin stations having capacity sufficient to provide carload movements of approximately 3,000 cars per year, no corn has moved via rail from these stations to Kankakee because over the years this traffic has been trucked to elevators located on the Illinois River for subsequent movement via barge to Chicago, from which the corn can be [fol. 216] reshipped east and has the benefit of the Chicago reshipping rates. Due to this arrangement naturally the corn becomes more valuable from a billing standpoint. This situation can best be illustrated by the fact that the New York Central in its Tariff 701-A, I.C.C. No. 1169, circle reference No. 167, provides the following rate application:

> "On Grain from Chicago, Ill., Gibson, Ind., Hammond, Ind., Indiana Harbor, Ind. and South Chicago, Ill. to Kankakee, Ill. billed for transit, charges will be collected on the basis of 6 cents (subject to X-206) per 100 pounds on the weight of the inbound tonnage."

This illustrates that ex-barge corn has the benefit of Chicago reshipping rates through Kankakee for milling in transit. All the New York Central is undertaking to do is to meet the barge competition via Chicago by bringing the grain into Kankakee by rail from the involved origins and letting the reshipping rates apply as is currently the practice. All that is involved is a substitution of rail service

to Kankakee, in lieu of barge-rail service via Chicago, as under the latter arrangement Chicago reshipping rates apply. All that is here intended is to apply reshipping rates from Kankakee, which are identically the same as from Chicago, when applied in the same manner as the Chicago ex barge proportional rates.

Exhibit No. 6, attached hereto and made a part hereof, is a copy of Note 20, Supplement 84 to CTR Tariff 245-H, Agent H. R. Hinsch's ICC No. 4403, which provides for the application of reshipping or proportional rates from Chicago, Joliet, Kankakee, etc., to destinations east of the Buffalo-Pittsburgh line and that the local rate need not be protected as minima in connection with shipments moving to Chicago via river or canal. A similar provision is published in Note 45 in Supplement No. 38 to CTR Tariff 535-C, Agent H. R. Hinsch's I.C.C. No. 4499, naming rates [fol. 217] from Kankakee to so-called Central Territory and Western Termini of Eastern Trunk Lines.

The foundation for this Fourth Section application hinges entirely on the fact that on corn arriving at Chicago by barge, the eastern lines apply the proportional or reshipping rates from Chicago to the East. Fourth Section relief authorizing higher rates from points intermediate to Chicago is granted under Fourth Section Application No. 23982 (277 ICC 75), Fourth Section Order No. 16365, (temporary). All this application seeks is like authority to maintain higher rates from origin intermediate stations to Kankakee when the corn is rail hauled at the 5½-cent proportional rate from the involved origin stations to Kankakee, plus reshipping rates therefrom.

The following tabulation shows the present local and proportional or reshipping rates on grain from Kankakee and Chicago to typical destinations, together with their respective differences or spreads between the local and proportional rates:

DOMESTIC GRAIN PRODUCTS RATES, CARLOAD IN EFFECT FROM KANKAKEE, ILL. AND EX BARGE FROM CHICAGO, ILL.

(Rates shown are in cents per 100 pounds and are subject to Ex Parte 206)

To:	Local	Proportional or Reshipping	Difference
Buffalo-Pittsburgh	(2)54½	(1) 38½	16
Baltimore-Norfolk	(3)63	(3) 46½	16½
Syracuse-Rochester	(3)59½	(3) 43	16½
Albany, N.Y.	(3)64	(3) 47½	16½
New York, N.Y.	(3)66	(3) 49½	16½
Boston, Mass.	(3)68	(3) 51½	16½

(1) CTR 535-C, ICC No. 4499
(2) NYC 701-A, ICC No. 1169
(3) CTR 245-H, ICC No. 4403

[fol. 218] In the case of Chicago, Fourth Section relief is available under Fourth Section Application No. 23982 (277 ICC 75), Fourth Section Order No. 16365, (temporary).

In view of the fact that both factors of the aggregate of intermediate rates over Kankakee either conform or are amply protected by outstanding relief and petitioner was merely meeting a competitive barge and barge-rail situation where barged corn had the benefit of the Chicago-Kankakee reshipping rates under aforementioned Fourth Section Relief, it was felt, in principle, the same situation was involved in the application of the aggregate of intermediates of the 5½-cent proportional rate to and the reshipping rate from Kankakee. It was therefore concluded that no additional relief was necessary and publication was accordingly made.

On February 26, 1957, the New York Central Railroad was advised by the Commission that due to the restrictive application of the proportional rates, unauthorized departures were created at destination in that higher rates applied to intermediate points in Central Territory. Whereupon investigation was made and it was determined that departures, as stated, were created unknown to the peti-

tioner. In order that these unauthorized destination departures could be eliminated, a proposal was placed on the docket to extend the application of the involved 5½-cent proportional rate to destinations in Central Territory. Publication of this extension has now been made in Supplement 126 to NYC Tariff 701-A, ICC No. 1169, effective July 30, 1957, which automatically removes such departures.

With regard to origin Fourth Section departures or the maintenance of higher rates from stations east thereof intermediate to Kankakee, it is contended that this situation [fol. 219] is no different than exists with respect to the corn movement by barge from involved stations over Chicago. However, investigation does reveal that because of the nature of the Fourth Section relief applying currently, technically Fourth Section Departures exist in the application of the combination rate, proportional to Kankakee and reshipping beyond.

Investigation developed that technically departures exist at origin via direct and indirect routes in that the aggregate of intermediate rates from the involved origins to Kankakee and the reshipping rates beyond would be lower than the local rates from Kankakee and points east thereof as illustrated in Exhibit No. 1. Additional relief is therefore necessary at origin; thus this application.

In the exercise of its managerial discretion the New York Central feels it should be permitted to participate and recapture its fair share of this corn and to transport it from the involved stations to Kankakee when for movement beyond to destinations in Central, Trunk Line and New England Territories.

In actual practice today the corn is trucked by the farmers from the origin areas to river points at his expense. Under the published rate of 5½ cents to Kankakee, shippers are given the opportunity to bring the corn to elevators at involved points for subsequent shipment beyond Kankakee on basis of the same reshipping rates from Kankakee as applicable on ex-barge corn reshipped from Chicago. In every case the reshipping rates from Kankakee and Chicago are identical.

Exhibit No. 7, attached hereto and made a part hereof, is a copy of Item 279 in Supplement 84 to CTR Tariff 245-H, Agent H. R. Hinsch's ICC No. 4403, which provides a general exception to the application of rates on grain and [fol. 220] products thereof from the involved New York Central stations when routed via Kankakee for milling in transit; combination rates apply in lieu thereof. This provision is instrumented by the fact that in connection with the Kankakee rate application, rail movement is utilized to and from Kankakee and appropriate provisions had to be published to cancel the application of through rates from involved territory to destinations beyond Kankakee, whereas in connection with the barge movement to Chicago, there being no prior rail movement, no such provision is necessary as ex-barge grain has the benefit of Chicago reshipping rates.

Though seemingly Fourth Section departures would result from the application of the 5½-cent proportional rate when added to the reshipping rate, it is felt such departures are technically theoretical as petitioning carriers is merely attempting to meet a competitive situation with factors of aggregate of intermediate rates of which the 5½-cent proportional being subject to Rule 27 conforms to the fourth section of the Act, whereas the reshipping rates are already afforded Fourth Section Relief.

IV

Related Proceedings

Applicants are not aware of any related proceedings pending before the Commission.

V

Conclusion

Petitioning carriers are merely attempting to meet a competitive situation with no change whatever in the Kankakee reshipping rates and it is all premised on meeting "like with like" the ex-barge reshipping basis from Chicago [fol. 221] versus rail movement to Kankakee on a competitive proportional rate to Kankakee. Again reiterating, the

reshipping rates on grain from Chicago and Kankakee are identical.

Petitioning carriers respectfully allege that circumstances confronting them are no different from adjustments involving ordinary departures from the long-and-short-haul provision of Section 4(1) of the Act. Through the continuation and publication of the 5½-cent rate to Kankakee as a proportional rate applicable only on corn milled in transit, the involved railroad, the New York Central, is able to recapture a share of the corn movement. Based on elevator capacity at origin stations, it can at best recover approximately 6,000,000 bushels annually, and the barge river movement into Chicago for the year 1955 approximated 14,887,000 bushels, thus demonstrating the rate will have only a partial effect on waterway corn, and the New York Central should not be denied a share of the movement because of theoretical Fourth Section departures.

WHEREFORE, your petitioners respectfully pray that your Commission expedite the handling of this application and grant the relief sought.

[fol. 222] All of which is,

Respectfully submitted,

O. E. Schultz, Vice-Chairman, Traffic Executive Association-Eastern Railroads, Agent for Applicants, One Park Avenue, New York 16, N.Y.

* * * * * * *

Duly sworn to by O. E. Schultz, jurat omitted in printing.

STATEMENT OF RATES, REVENUES, ETC., ON CORN, CARLOADS VIA SHORT LINE ROUTES AND VIA REPRESENTATIVE DEPARTURE ROUTES (SUBJECT TO EX PARTE 206)

TO	Route No.	Miles	Per-cent Cir-cuity	Rates in cents per 100 Pounds (4)	Per Ton Mile (Mills)	Per Car (Dollars) (A)	Per Car Mile (Cents)
New York, N.Y.							
From:							
Moronts, Ill.	1	991.3		(1)54½	10.99	#347.00	35.00
Via Shortest Working Route							
(Departure Route)				(2)72½	14.62	435.00	43.88
Via Departure route	2	1047.9	6%	(1)54½	10.40	#347.00	33.11
				(2)72½	13.83	435.00	41.51
Via Departure Route	3	1184.2	19%	(1)54½	9.20	#347.00	29.30
				(2)72½	12.24	435.00	36.73
HIGHER RATED INTER-MEDIATE POINTS OF ORIGIN ON DEPARTURE ROUTES							
Kankakee, Ill.	1	907.8		(2)66	14.54	396.00	43.62
(First higher rated intermediate origin)				(3)49½	10.90	297.00	32.72
Hamilton, Ind.	1	740.3		(2)56	15.12	336.00	45.39
(Last higher rated intermediate origin)							
Kankakee, Ill.	2	964.4		(2)66	13.68	396.00	41.06
(First Higher rated intermediate origin)				(3)49½	10.26	297.00	30.80
Butler, Ind.	2	785.9		(2)56	14.25	336.00	42.75
(Last Higher rated intermediate origin)							
Kankakee, Ill.	3	1000.7		(2)66	13.19	396.00	39.57
(First Higher rated intermediate origin)				(3)49½	9.89	297.00	29.68
Lawrenceburg Jct., Ind.	3	874.2		(2)56	12.81	336.00	38.44
(Last higher rated intermediate origin)							

FOR EXPLANATION OF ROUTES, REFERENCES AND TARIFF AUTHORITIES SEE PAGE NO. 2.

[fol. 223]

EXHIBIT No. 1

223

[fol. 224]

Exhibit No. 1
Page No. 2

EXPLANATION OF ROUTES

1—NYC(W)-North Liberty, Ind.-Wabash RR-Buffalo, N.Y., DL&W.
2—NYC(W)-Gardenville, N.Y.-NYC(E).
3—NYC(W)-Kankakee, Ill.-NYC(C)-via Cincinatti, Ohio to Cleveland Ohio-NYC(W)-Gardenville, N.Y.-NYC(E).

EXPLANATION OF REFERENCES

(A)—Based on average load of 60,000 pounds from Kankakee, Ill. except as noted.
#—Based on minimum weight from Kankakee, Ill. of 60,000 pounds and 100,000 pounds to Kankakee, Ill.
(1)—Proposed 5 cent rate to Kankakee, Ill. plus 49½ cent proportional rate beyond as authorized by CTR Tariff 245-H, ICC 4403 (49½ cents is also the proportional rate from Chicago).
(2)—Local rate as authorized by CTR Tariff 245-H, ICC 4403.
(3)—Proportional rate beyond applying on Ex-Barge traffic.
(4)—Subject to Ex Parte 206 increase.

TARIFF AUTHORITIES

NYC 2801, I.C.C. L.S. No. 1536
NYC 21, I.C.C. No. 8515
NYC A-1458, I.C.C. No. 16802
Wabash B-15221, I.C.C. No. 6442
DL&W 1655, I.C.C. No. 22030
CTR 245-H, I.C.C. No. 4403

[fol. 225]

EXHIBIT No. 2

Explanation of color scheme used on map to depict departures in rates on Corn, carloads

FROM

Moronts, Ill.

TO

New York, N.Y.

RED LINE: Represents typical indirect departure route (in part) via NYC RR(W)-Gardenville, N.Y. and NYC RR(E)

RED-VIOLET LINE: Represents shortest tariff and departure route (in part) via NYC RR(W)-North Liberty, Ind., Wabash RR-Buffalo, N.Y. and DL&W RR.

RED-BROWN LINE: Represents typical indirect departure route (in part) via NYC RR (W)-Kankakee, Ill.-NYC RR(C)-Cleveland, Ohio-NYC RR(W)-Gardenville, N.Y. and NYC RR(E).

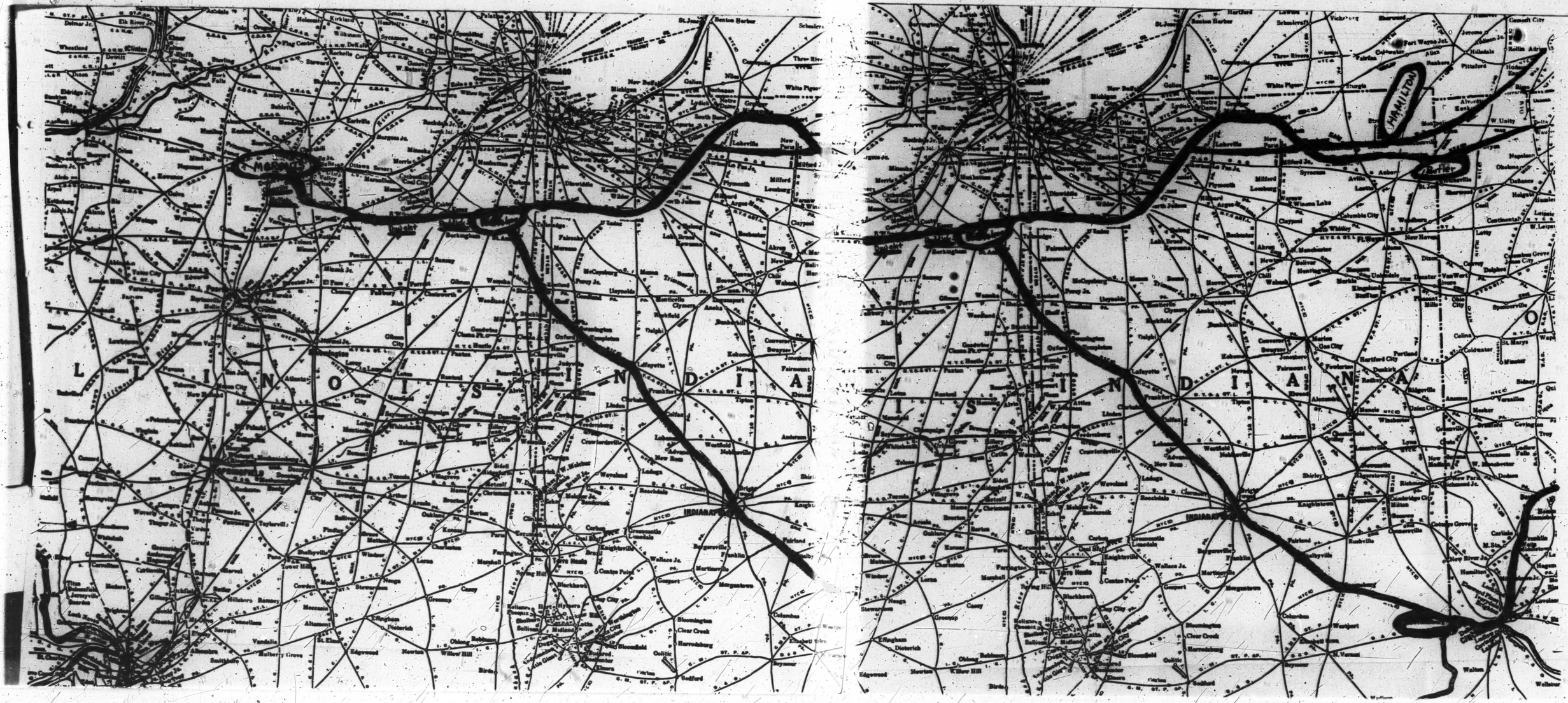
The origin point is circled in BLACK.

Other involved origins are underscored in BLUE.

The representative higher rated intermediate origin points are circled with SOLID LINES in the same color as the departure route.

EXHIBIT No. 2 (Cont.)

(See opposite) ☞


HAMILTON
ILLINOIS
INDIANA

[fol. 228]

EXHIBIT No. 4

GRAIN ELEVATORS ON NYC(W) AT INVOLVED STATIONS

Railroad Mileage to Kankakee Illinois		Approximate Highway Miles to Nearest River Point		Grain Elevators Capacity In Bushels
5.2	Van's Siding	35	E. S. Hamilton	8,000
14.6	Union Hill, Ill.	28	Farmers Elevator Co.	12,000
20	Reddick, Ill.	28	Farmers Elec. Co.	15,000
23	Blair, Ill.	25	Nielsen Grain Co.	5,000
29.2	Dwight, Ill.	19	Farmers Co-Op Elev.	45,000
34.4	Sunbury, Ill.	18	Federal No. Iowa Grain Co.	25,000
39.3	Budd, Ill.	17	Cahill Grain Co.	30,000
45.7	Missal, Ill.	19	Missal Farmers Grain Co.	25,000
55.6	Altmar, Ill.	15	Hoarty Grain Co.	16,000
60.7	Milla, Ill.	13	Milla Elevator Co.	20,000
64.4	Lostant, Ill.	12	Lostant Grain Co.	20,000
68.6	Priscilla, Ill.	11	H. L. Phillips Grain Co.	20,000
73.4	McNabb, Ill.	10	McNabb Grain Co.	100,000
79.3	Granville, Ill.	4	Granville Cooperative Co.	15,000
83.5	*Moronts, Ill.	on river	J. E. Bonges Grain Co.	15,000
				371,000 Bu.

*No barge facilities.

REVENUES, EXPENSES, AND FREIGHT TRAFFIC

Class I Railroads of the Eastern District
Calendar Year Ended December 31, 1955

Road	Miles of road operated: Average during year	Miles of road operated: Average during year - first service	Miles of road operated: Total all tracks at close of year	Operating revenues: Total	Operating revenues: Freight proportion	Operating expenses: Total	Operating expenses: Freight proportion	Operating ratio: Total	Operating ratio: Frt.	Net railway operating income: Total	Net railway operating income: Freight proportion	Revenue tons carried	Ton-miles: Revenue	Ton-miles: Revenue and non-revenue	Average haul per revenue ton (miles)	Loaded freight car-miles	Net tons per loaded car	Per ton-mile: Freight revenue (cents)	Per ton-mile: Freight expense (cents)	Per ton-mile: Freight revenue (cents)
1	2	3	4	5	6	7	8	9=7÷5	10=8÷6	11	12	13	14	15	16=14÷13	17	18=15÷17	19=6÷14	20=8÷14	21=6÷17
NEW ENGLAND REGION:																				
Boston & Providence	402	396	860	813 309 641	812 553 484	810 573 626	89 191 884	79.44	71.21	83 015 490	83 758 837	3 675 955	670 541 000	681 872 000	135.37	17 283 628	27.88	2.668	1.953	72.632
Central Vermont	1 575	1 564	3 018	85 906 629	68 911 121	65 799 574	39 144 778	76.53	56.80	6 894 531	19 144 894	18 078 157	2 972 171 000	3 006 619 000	164.36	136 563 138	25.79	2.319	1.317	59.319
Canadian National Lines in New England	172	172	251	2 578 000	2 415 256	2 678 227	2 180 962	103.89	90.30	def 1 121 442	def 630 684	1 011 795	117 080 000	119 197 000	115.73	4 606 915	27.04	2.063	1.863	54.830
Canadian Pacific (Lines in Maine)	234	234	309	6 462 871	5 558 841	5 579 469	4 248 367	86.33	76.43	88 266	844 638	2 297 594	396 901 000	433 594 000	172.73	14 535 160	30.59	1.400	1.070	38.240
Canadian Pacific (Lines in Vermont)	90	90	135	2 492 130	2 333 161	2 732 144	2 380 884	101.49	86.62	def 997 688	def 481 947	2 297 718	160 984 000	161 460 000	67.16	6 492 882	24.87	1.449	1.255	35.934
Central Vermont	428	428	781	22 922 737	9 887 579	8 731 [illegible]	7 238 [illegible]	38.09	73.20	[illegible]	[illegible]	1 841 738	526 195 000	530 531 000	287.19	20 584 773	25.56	1.883	1.380	67.010
Maine Central	466	944	1 270	24 890 578	22 344 258	19 321 963	14 553 031	77.63	65.13	2 288 601	4 998 194	7 317 868	905 944 000	916 668 000	123.80	32 927 995	27.83	2.066	1.606	67.858
New York Connecting	21	20	45	4 379 626	4 070 199	2 495 362	2 270 266	56.92	55.78	952 834	317 877	5 191 821	102 523 000	102 523 000	19.75	4 565 627	22.46	3.970	2.214	89.149
New York,New Haven & Hartford	1 969	1 966	3 967	155 118 869	91 732 257	127 036 086	59 959 252	81.90	65.36	5 732 339	19 987 869	22 723 294	3 499 341 000	3 535 834 000	151.95	141 700 241	24.59	2.660	1.739	64.739
Rutland	392	392	680	6 811 335	6 811 335	3 957 386	3 957 386	82.25	82.25	845 937	845 937	1 712 673	841 307 000	843 395 000	140.78	8 675 017	28.06	1.996	1.996	55.462
Total - New England Roads	6 217	6 176	10 734	331 105 589	284 396 831	248 814 841	144 762 365	79.98	64.51	17 235 088	49 051 912	67 648 291	9 390 291 000	9 513 489 000	138.85	367 713 418	25.73	2.403	1.550	61.825
EASTERN REGION:																				
Atlantic & Danville	213	213	345	1 651 335	1 651 335	1 247 286	1 247 286	75.54	75.54	13 706	13 706	987 300	102 125 000	105 278 000	103.44	3 290 000	32.00	1.617	1.221	50.186
Chesapeake & Ohio	5 113	5 068	10 159	380 281 057	345 304 376	258 841 414	233 996 778	68.07	64.06	68 909 097	80 891 225	121 712 784	35 435 511 000	36 027 965 000	288.96	770 118 371	46.44	1.039	0.665	47.435
Norfolk & Western	2 138	2 106	4 179	288 891 143	280 443 843	138 719 486	130 685 126	64.41	60.21	37 841 242	48 806 360	70 609 617	19 953 161 000	20 492 332 000	283.39	414 673 985	69.42	1.005	0.605	48.338
Richmond,Fredericksburg & Potomac 2	118	110	488	26 274 073	17 572 688	17 619 678	7 917 721	67.06	45.06	2 981 988	5 071 082	24 070 761	885 690 000	888 792 000	170.94	8 312 914 000	30.59	1.706	1.174	50.588
Virginian	611	611	1 082	44 805 611	44 168 639	24 293 571	23 689 559	54.96	53.66	13 413 146	14 061 183	18 196 295	4 346 309 000	4 400 111 000	238.84	81 566 056	53.95	1.036	0.545	54.126
Total - Pocahontas Roads	8 183	8 088	16 695	661 303 039	639 139 786	440 721 377	387 536 400	66.64	61.80	123 159 179	148 843 456	235 376 757	60 722 884 000	61 914 478 000	274.63	1 306 283 685	47.18	1.041	0.641	48.161
CENTRAL EASTERN DISTRICT ROADS:																				
Akron,Canton & Youngstown	171	171	229	6 000 867	6 000 867	4 271 478	4 271 478	71.19	71.19	765 949	765 949	3 270 439	330 380 000	331 498 000	101.02	9 147 619	36.24	1.816	1.293	65.592
Ann Arbor	292	292	466	9 323 481	9 323 481	7 434 273	7 434 273	79.74	79.74	1 006 147	1 006 147	2 779 881	676 764 000	704 849 000	194.22	19 661 134	28.91	1.727	1.377	238.068
Pittsburg & Ohio	6 167	6 061	11 730	432 861 417	398 763 679	350 435 966	990 225 095	81.30	72.78	38 898 776	71 533 874	115 389 980	28 709 021 000	29 181 933 000	249.02	786 975 706	38.05	1.389	1.011	53.992
Pittsburg & Lake Erie	208	208	514	86 451 160	86 442 981	57 998 535	57 973 514	67.53	67.46	6 807 747	6 836 535	22 642 607	2 284 700 000	2 312 914 000	100.93	29 930 675	77.28	1.148	0.808	89.016
Reading & Indiana	35	35	60	1 999 500	1 999 500	1 496 667	1 496 667	74.12	74.12	1 165 407	1 165 407	1 237 195	62 250 000	62 296 000	19.35	1 042 357	59.76	1.092	2.403	184.630
Central R.R.of New Jersey	813	813	1 811	37 870 231	29 375 021	25 921 294	22 889 118	79.84	65.90	4 565 339	11 302 070	33 732 123	2 152 690 000	2 175 813 000	63.81	54 430 727	38.54	2.303	1.358	87.220
Chicago & Eastern Illinois	868	868	1 417	34 454 906	29 626 689	27 396 632	21 615 439	79.51	72.96	4 030 900	5 181 957	14 914 118	2 175 235 000	2 217 383 000	145.85	44 181 390	34.55	1.362	0.994	46.161
Chicago & Illinois Midland	130	130	234	7 687 629	7 682 468	5 217 953	5 235 276	67.84	67.89	1 027 079	1 025 203	8 359 572	364 612 000	368 845 000	43.59	7 099 860	51.90	2.108	1.431	108.305
Chicago,Indianapolis & Louisville	481	508	813	22 312 880	20 533 433	17 088 799	14 115 849	76.58	68.81	2 301 281	3 477 557	7 033 984	1 382 519 000	1 398 904 000	170.94	30 550 275	29.85	1.706	1.174	50.588
Delaware & Hudson	732	732	1 599	50 883 317	50 641 783	34 923 185	32 646 186	69.82	65.26	10 463 673	12 529 772	20 447 495	4 967 307 000	4 012 530 000	194.02	114 327 060	35.10	1.261	0.823	63.771
Delaware,Lackawanna & Western	403	403	1 147	33 [illegible] 817	33 [illegible] 817	30 705 [illegible]	33 447 [illegible]	91.50	77.98	2 [illegible] 679	7 [illegible] 133	23 035 028	4 179 866 000	4 254 089 000	181.45	151 801 085	28.10	1.681	1.279	93.296
Detroit & Mackinac	312	312	776	2 882 067	2 882 067	1 521 477	1 521 477	60.09	60.09	302 896	302 896	1 689 433	305 952 000	308 985 000	62.71	2 550 000	42.58	2.008	1.436	86.356
Detroit & Toledo Shore Line	90	90	171	8 375 280	8 375 280	4 594 541	4 594 541	54.62	54.62	1 124 933	1 124 933	7 261 019	330 047 000	330 478 000	45.45	8 857 616	37.32	2.538	1.386	94.358
Detroit,Toledo & Ironton	464	464	697	21 039 177	21 039 177	13 302 613	13 302 613	63.23	63.23	6 635 348	6 635 348	8 273 992	820 701 000	826 429 000	94.77	25 470 000	32.45	2.628	1.661	82.604
Elgin,Joliet & Eastern	246	246	1 092	20 402 793	20 402 793	10 225 369	10 225 369	50.66	50.66	6 873 893	6 873 893	40 201 648	1 139 111 000	1 141 395 000	34.22	12 219 284	42.00	1.655	2.218	153.014
Erie	2 [illegible]	2 [illegible]	3 [illegible]	141 [illegible]	140 [illegible]	100 [illegible]	100 [illegible]	71.31	72.31	13 [illegible]	17 [illegible]	25 555 [illegible]	5 [illegible] 819	5 [illegible] 000	199.90	105 [illegible] 089	36.53	1.593	1.153	58.305
Grand Trunk Western	952	952	2 145	61 669 687	56 588 337	47 556 564	40 398 913	77.12	71.36	4 689 284	7 926 480	17 255 819	3 021 542 000	3 062 778 000	178.18	105 744 961	28.39	1.905	1.359	53.904
Illinois Terminal	353	503	508	12 253 475	11 040 229	9 444 604	8 237 589	78.09	74.61	484 688	1 129 625	6 833 354	461 255 000	464 963 000	67.50	12 765 000	36.42	2.394	1.786	86.688
Lehigh & Hudson River	96	96	160	3 168 298	3 168 157	2 186 810	2 186 810	69.02	69.02	295 264	294 789	3 559 288	250 568 000	253 031 000	70.40	8 998 120	28.53	1.264	0.873	36.010
Lehigh & New England	179	179	306	7 549 236	7 549 236	5 972 238	5 972 238	79.09	79.09	2 085 752	2 085 752	7 185 813	277 212 000	279 265 000	37.84	5 762 465	48.46	2.723	2.157	131.000
Lehigh Valley	1 133	1 132	2 [illegible]	63 [illegible] 231	63 [illegible] 231	47 [illegible] 231	47 [illegible] 231	74.30	74.30	8 [illegible] 796	12 [illegible] 796	23 [illegible] 796	4 [illegible] 533 000	4 [illegible] 051 000	171.62	127 [illegible] 345	31.89	1.579	1.181	50.090
Long Island	351	345	879	14 049 298	13 580 368	12 226 643	9 983 263	87.05	73.54	1 401 688	1 196 284	4 994 657	992 451 000	994 135 000	198.77	3 107 335	30.29	14.689	10.582	417.042
Missouri-Illinois	172	172	241	5 656 933	5 656 933	3 865 193	3 865 193	57.72	57.72	1 428 706	1 428 706	4 581 302	260 305 000	211 186 000	43.72	4 380 080	48.22	2.824	1.630	129.151
Monongahela	177	177	283	5 529 792	5 529 792	3 526 403	3 526 403	63.59	63.59	482 554	482 554	2 188 053	395 958 000	396 204 000	42.18	7 003 819	56.57	1.397	0.888	78.954
Montour	53	53	83	1 [illegible] 218	1 [illegible] 218	1 [illegible] 218	1 [illegible] 218	83.72	83.72	409 681	409 681	2 [illegible] 452	89 [illegible] 000	90 [illegible] 000	37.56	1 553 178	58.13	2.066	1.488	119.193
New York Central	10 [illegible]	10 [illegible]	23 [illegible]	362 [illegible] 376	357 [illegible] 078	420 [illegible] 819	420 [illegible] 819	79.16	69.32	71 [illegible] 491	111 [illegible] 538	161 [illegible] 694	34 [illegible] 715 000	34 [illegible] 000	214.98	1 214 [illegible] 734	31.89	1.556	1.078	68.015
New York,Chicago & St.Louis	2 [illegible]	2 [illegible]	4 [illegible]	162 [illegible] 845	159 [illegible] 446	130 [illegible] 844	104 [illegible] 250	67.83	65.54	22 [illegible] 985	25 [illegible] 972	52 [illegible] 094	11 [illegible] 491 000	11 [illegible] 000	214.71	367 [illegible] 000	31.20	1.424	0.934	63.308
New York,Ontario & Western	541	541	732	5 [illegible] 014	5 [illegible] 014	6 [illegible] 061	6 [illegible] 061	107.36	107.36	def 1 [illegible] 335	def 1 [illegible] 335	2 [illegible] 899	357 [illegible] 000	360 [illegible] 000	130.95	13 [illegible] 000	26.21	1.590	1.707	41.302
New York,Susquehanna & Western	130	130	286	5 665 169	5 [illegible] 817	3 [illegible] 193	3 [illegible] 193	75.99	60.41	[illegible] 722	1 [illegible] 001	2 [illegible] 301	87 [illegible] 000	87 [illegible] 000	30.34	2 202 000	39.84	5.754	3.475	238.559
Pennsylvania	10 [illegible]	9 [illegible]	24 [illegible]	336 [illegible] 870	328 [illegible] 085	248 [illegible] 234	248 [illegible] 234	73.86	73.38	48 [illegible] 003	119 [illegible] 780	201 [illegible] 430	39 [illegible] 452 000	51 [illegible] 241 000	249.20	1 524 [illegible] 426	33.46	1.493	1.095	69.089
Pennsylvania-Reading Seashore Lines	358	358	634	9 [illegible] 781	7 [illegible] 865	10 [illegible] 602	5 [illegible] 913	109.33	80.69	def 1 [illegible] 788	def 486 434	4 [illegible] 472	200 [illegible] 000	202 [illegible] 000	12.21	5 [illegible] 510	41.43	3.690	2.797	158.770
Pittsburgh & Lake Erie	221	221	1 067	[illegible] 301 043	39 [illegible] 869	31 703 478	28 813 879	76.76	72.10	13 162 978	14 844 579	34 717 338	1 840 963 000	1 866 827 000	53.60	34 847 726	53.57	2.147	1.548	114.681
Pittsburg & Shawmut	97	97	140	1 [illegible] 918	1 [illegible] 918	1 [illegible] 776	1 [illegible] 776	75.92	75.92	[illegible] 585	[illegible] 585	1 [illegible] 304	76 [illegible] 000	76 [illegible] 000	44.80	1 [illegible] 582	55.16	2.439	1.852	133.921
Pittsburgh & West Virginia	132	132	244	8 [illegible] 862	8 [illegible] 862	6 [illegible] 518	6 [illegible] 518	73.86	73.86	1 [illegible] 633	1 [illegible] 633	7 351 843	476 [illegible] 000	476 [illegible] 000	64.77	12 729 893	38.96	1.921	1.327	70.521
Reading Company	1 [illegible]	1 [illegible]	2 [illegible]	132 [illegible] 934	109 [illegible] 015	92 [illegible] 989	76 [illegible] 921	77.22	69.78	15 [illegible] 001	21 [illegible] 212	64 [illegible] 452	6 [illegible] 109 000	6 [illegible] 120 000	100.69	154 440 002	42.57	1.682	1.172	71.052
Staten Island Rapid Transit	29	29	109	3 [illegible] 786	2 [illegible] 419	2 [illegible] 496	1 [illegible] 403	76.20	71.26	def 483 [illegible]	518 403	1 [illegible] 230	17 [illegible] 000	17 [illegible] 000	9.82	493 697	33.84	13.282	7.045	475.180
Toledo	2 393	2 381	4 295	118 564 821	106 730 252	86 968 069	75 003 292	73.33	68.99	19 664 616	21 130 990	24 843 048	7 130 396 000	7 280 762 000	286.20	294 817 256	24.70	1.529	1.055	36.874
Western Maryland	847	847	1 398	47 625 934	47 309 615	31 941 412	31 442 893	67.35	66.46	10 489 596	10 919 777	26 265 187	3 658 616 000	3 695 572 000	139.30	78 464 165	47.10	1.293	0.859	60.295
Total - Other Eastern Dist. Roads	46 437	46 087	98 600	3 425 942 949	2 905 035 847	2 701 102 657	2 061 953 496	78.84	70.95	301 059 265	515 106 416	1 016 721 988	184 588 129 000	190 379 260 000	183.69	5 716 895 091	33.27	1.559	1.106	50.815
Grand Total - Eastern District	60 837	60 311	126 033	4 398 351 577	3 758 552 680	3 390 638 895	2 593 352 261	77.09	69.00	481 454 332	713 001 784	1 317 736 076	256 701 304 000	261 807 227 000	196.68	7 390 892 194	35.35	1.467	1.012	50.854

Source: Annual reports of the railroads to the Interstate Commerce Commission.

Def - Denotes deficit.

r Includes nonrevenue loaded car-miles.

1/ Averages in columns 18, 27 and 28 are computed on road ton-miles only.
Columns 14 and 15 include the following lake or harbor transfer service ton-miles:

Road	Col. 14	Col. 15
New York,New Haven & Hartford	51 116 000	51 643 000
Chesapeake & Ohio	265 875 000	265 479 000
Ann Arbor	136 959 000	137 072 000
Grand Trunk Western	60 224 000	60 124 000
Total Eastern District	514 174 000	515 018 000

2/ Averages in columns 16, 18, 19, 20, 27 and 28 for Richmond, Fredericksburg & Potomac Railroad (Pocahontas Region and Eastern District) are computed after deducting the following: (Authorized by the I.C.C., file S-597317)

Revenue tons carried (Col.13)	15 134 061
Revenue ton-miles (Col.14)	24 059 000
Revenue and nonrevenue ton-miles (Col.15)	24 059 000

3/ Averages in Columns 21 and 22 for Ann Arbor computed on following car-miles:

Rail	19 661 134
Lake transfer	4 843 167
Total	24 504 301

REVENUES, EXPENSES, AND FREIGHT TRAFFIC

Class I Railroads of the Eastern District
Calendar Year Ended December 31, 1955

Operating expenses		Operating ratio		Net railway operating income		Revenue tons carried	Ton-miles a		Average haul per revenue ton (miles)	Loaded freight car-miles	Net tons per loaded car	Per ton-mile		Per loaded car-mile		Freight revenue		Net ry. oper. income per mile of road		Net ton-miles	
Total	Freight proportion	Total	Frt.	Total	Freight proportion		Revenue	Revenue and non-revenue				Freight revenue (cents)	Freight expense (cents)	Freight revenue (cents)	Freight expense (cents)	Per mile of road	Per mile of all tracks	Total	Freight proportion	Per mile of road	Per mile of all tracks
7	8	9=7÷5	10=8÷6	11	12	13	14	15	16=14÷13	17	18=13÷17	19=8÷14	20=8÷14	21=8÷17	22=8÷17	23=6÷3	24=6÷4	25=11÷2	26=12÷3	27=14÷3	28=14÷4
810 573 626	89 191 884	79.46	73.21	83 015 490	83 756 837	1 475 955	470 593 000	481 872 000	135.37	17 283 629	27.88	2.668	1.953	72.432	53.176	821 063	814 597	85 009	86 307	808 534	794 314
45 729 594	39 244 798	76.51	56.80	6 896 733	39 244 894	28 078 257	2 772 373 000	3 086 619 000	144.34	136 563 138	25.79	2.319	1.317	59.819	33.982	44 063	22 933	4 377	12 241	1 928 391	994 249
2 618 227	2 280 942	103.89	90.38	Def 1 121 442	Def 630 480	1 811 705	117 680 000	119 197 000	115.73	4 404 975	27.06	2.663	1.863	54.830	49.511	16 062	9 623	Def 6 526	Def 3 667	693 006	474 882
5 579 669	4 248 367	84.35	76.43	811 246	844 428	2 397 774	396 986 000	415 594 000	172.73	14 535 360	28.39	1.600	1.070	38.360	29.228	23 753	18 105	377	3 603	1 776 043	1 153 726
2 732 344	2 080 888	101.09	86.42	Def 997 408	Def 681 947	2 397 718	260 986 000	261 660 000	67.36	6 492 882	24.87	1.409	1.255	35.936	31.135	25 966	17 883	Def 11 083	Def 5 155	1 798 000	1 129 660
8 731 900	7 329 305	76.27	74.20	335 887	886 305	3 861 736	526 995 887	539 537 000	139.07	28 364 775	21.20	1.261	1.300	47.020	35.196	23 128	15 639	782	3 813	1 366 227	911 145
29 321 763	24 553 631	77.63	65.13	2 280 681	6 996 119	9 317 968	905 944 000	916 468 000	123.80	32 927 975	27.83	2.466	1.484	67.858	44.197	23 670	17 596	3 426	5 295	970 835	721 629
2 475 362	2 270 266	46.52	55.78	762 834	317 877	5 191 821	382 523 000	382 523 000	19.75	4 565 687	23.06	3.970	2.230	89.109	69.725	703 510	62 618	36 326	15 894	5 132 150	1 577 277
127 836 884	99 999 253	81.90	66.36	9 733 339	19 987 868	27 723 284	3 499 341 000	3 535 899 000	151.75	141 720 241	26.59	2.660	1.739	64.737	42.314	52 539	26 352	3 240	11 448	1 995 522	926 922
3 357 306	3 357 306	82.25	82.25	345 937	345 937	1 712 673	341 387 000	343 395 000	140.78	8 675 017	28.06	1.996	1.641	55.983	45.417	12 794	10 038	627	627	620 906	501 073
248 814 863	144 962 265	79.98	64.51	17 235 888	49 051 912	67 648 291	9 390 291 000	9 513 489 000	138.05	367 713 438	25.73	2.603	1.550	61.035	39.348	36 334	20 905	2 772	7 942	1 938 035	851 484
1 247 236	1 247 236	75.54	75.54	13 706	13 706	987 300	102 125 000	105 278 000	103.44	3 290 000	32.00	1.417	1.221	50.184	37.938	7 752	6 739	64	64	490 263	429 706
258 841 414	233 994 778	68.07	64.06	80 891 225	121 712 784	35 435 533 000	24 027 965 000	24 027 965 000	208.96	770 118 321	46.44	1.839	0.665	47.635	30.385	22 366	15 983	13 477	16 084	7 084 387	3 522 454
138 719 686	138 685 186	66.01	66.01	37 841 242	48 806 360	19 953 241 000	20 492 333 000		283.39	416 672 985	49.42	1.805	0.605	48.138	29.104	15 177	12 386	17 783	23 175	9 730 452	4 333 333
17 619 498	7 917 723	67.06	45.06	2 981 988	5 071 082	24 078 761	888 668 000	888 792 000	98.51	16 425 273	23.60	2.039	0.939	47.966	21.612	199 751	36 009	25 273	44 101	7 861 209	1 771 994
24 293 571	23 689 559	54.96	53.46	13 413 146	14 062 183	18 196 295	4 346 389 000	4 488 111 000	238.86	81 544 056	51.95	1.016	0.545	54.126	29.043	12 256	40 841	21 953	23 013	7 201 491	4 070 428
440 721 377	387 536 488	66.40	61.60	123 159 179	142 843 454	235 316 737	60 788 884 000	61 914 478 000	276.63	1 306 283 685	47.18	1.081	0.841	48.161	29.667	77 784	37 683	15 051	18 403	7 619 243	3 691 191
4 271 478	4 271 478	71.29	71.29	765 949	765 949	3 780 439	330 389 000	331 498 000	101.02	9 167 619	36.24	1.816	1.293	65.992	46.879	35 028	26 801	6 479	6 479	1 938 585	1 447 590
7 436 273	7 436 273	79.74	79.74	1 886 147	1 886 147	2 779 881	696 966 000	704 869 000	254.22	19 641 134	38.91	1.727	1.377	438.648	350.339	33 930	27 796	3 446	3 446	1 944 442	1 388 208
350 435 966	290 225 095	81.16	72.78	38 898 726	71 533 934	115 289 980	28 709 421 000	29 181 913 000	249.02	144 975 704	38.05	1.389	1.011	51.992	37.868	65 792	33 995	6 308	11 802	4 834 702	2 457 864
17 998 535	17 973 534	69.53	69.46	4 807 347	4 836 535	22 862 607	2 284 700 000	2 312 924 000	100.93	29 930 475	77.28	1.198	0.808	89.016	60.451	128 891	51 834	32 730	32 820	11 119 779	4 499 833
1 676 667	1 676 667	97.12	87.12	1 165 407	1 365 407	1 737 195	62 290 000	62 296 000	19.15	1 042 357	51.76	1.092	2.691	204.630	140.853	64 986	32 075	11 297	11 297	1 779 886	1 038 267
33 911 394	31 669 119	79.84	67.28	4 305 139	11 309 976	13 752 343	1 153 486 000	1 175 812 000	83.81	34 456 921	38.54	2.503	1.538	87.280	57.372	40 873	30 773	7 449	18 637	3 549 449	1 358 597
27 396 618	21 635 639	79.51	72.96	8 830 980	5 181 957	14 934 118	2 175 285 000	2 217 383 000	145.85	64 181 390	34.55	1.362	0.990	46.141	33.619	34 131	18 322	6 644	5 970	2 554 497	1 371 245
5 217 053	5 215 276	67.86	67.89	1 687 079	1 688 283	8 199 572	364 412 000	368 445 000	43.59	7 099 860	51.90	2.100	1.431	108.205	73.456	59 095	32 831	7 901	7 886	2 834 346	1 574 637
17 888 779	16 215 269	76.32	68.81	2 881 881	3 477 557	7 833 984	1 232 519 000	1 230 402 000	170.96	40 550 275	29.85	1.706	1.176	50.588	.809	40 381	25 232	3 884	6 846	2 382 681	1 458 809
16 923 245	16 923 245	69.82	69.82	4 451 249	4 451 249	3 599 288	250 548 000	251 031 000	70.40	8 798 100	28.53	1.364	0.871	38.910	24.855	33 002	19 557	3 075	3 071	2 614 906	1 549 574
5 272 240	5 272 240	72.20	72.20	2 032 152	2 032 152	2 485 152	277 212 000	279 265 000	37.84	5 762 445	48.46	2.723	2.157	131.998	104.564	42 175	24 671	11 652	11 652	3 560 028	912 565
33 880 496	27 982 263	81.20	74.80	6 994 378	11 994 277	21 855 279	3 037 533 000	4 039 681 000	177.82	127 610 345	31.89	1.379	1.181	50.090	37.844	55 938	23 436	7 159	11 052	3 541 799	1 483 805
52 226 643	9 983 263	85.95	72.04	1 401 889	1 196 239	4 994 657	92 453 000	94 135 000	18.77	3 207 335	30.29	14.689	10.582	437.042	314.847	39 363	25 450	3 992	3 467	272 855	107 093
3 865 393	3 865 193	77.72	77.72	1 438 986	1 438 786	4 581 202	209 385 000	211 184 000	43.72	4 380 000	48.22	2.826	1.630	129.153	74.546	32 889	23 473	8 306	8 306	1 227 826	876 290
3 536 401	3 536 401	63.59	63.59	482 554	482 554	9 388 951	395 958 000	396 204 000	42.18	7 003 819	56.52	1.397	0.888	78.954	50.207	31 242	19 540	2 726	2 726	2 238 441	1 408 814
3 534 219	3 534 219	63.35	63.35	487 636	487 636	2 588 459	89 128 000	89 181 000	37.56	1 551 178	58.13	2.946	1.688	119.593	97.604	36 338	22 336	9 602	9 602	1 768 455	1 086 518
693 771 213	438 939 834	78.16	68.32	93 897 427	111 201 598	161 878 894	38 182 715 000	39 133 836 000	236.38	1 234 697 234	31.69	1.556	1.078	49.283	33.895	55 604	25 943	6 900	10 438	3 469 800	1 699 337
110 090 844	104 250 966	67.83	65.54	21 972 585	25 257 972	52 482 074	11 147 491 000	11 459 308 000	214.71	347 284 080	31.80	1.424	0.934	43.368	28.384	73 846	39 453	10 043	11 747	5 320 011	2 842 089
6 995 661	6 995 661	107.36	107.36	Def 1 834 335	Def 1 834 335	2 726 809	357 071 000	360 243 000	130.95	13 744 980	26.21	1.590	1.707	83.302	44.744	10 496	7 168	Def 3 391	Def 3 391	645 884	454 952
4 306 801	3 660 133	75.97	60.41	898 722	1 061 391	2 883 301	87 495 000	87 726 000	30.34	2 202 000	39.84	5.754	3.475	228.559	138.461	41 941	22 269	2 456	8 842	731 050	388 168
248 888 736	248 730 136	81.36	81.30	48 946 681	119 812 186	201 147 490	29 126 453 000	31 130 263 000	249.20	1 524 980 426	31.66	1.493	1.095	49.489	35.981	75 677	30 828	6 873	12 031	5 189 048	2 113 834
10 129 902	3 981 811	107.33	88.29	Def 3 037 728	Def 880 432	4 219 472	200 944 000	202 788 000	32.21	4 689 570	43.43	3.690	2.977	238.770	128.108	20 709	12 075	Def 9 655	Def 1 951	546 425	330 261
31 763 478	28 813 879	76.76	72.28	23 162 978	24 864 579	34 717 338	1 840 963 000	1 846 827 000	53.60	34 847 726	53.57	2.347	1.548	114.681	82.685	180 832	39 686	59 561	67 170	8 447 181	1 853 850
1 409 776	1 409 776	75.92	75.92	337 585	337 585	1 496 300	76 129 000	76 453 000	44.80	1 586 582	55.14	2.439	1.852	133.921	101.673	29 243	12 895	9 357	9 357	788 175	536 924
6 338 538	6 338 538	71.26	71.26	1 298 633	1 298 633	7 351 843	474 215 000	476 533 000	64.77	12 229 893	38.96	1.911	1.327	70.523	51.665	65 340	39 930	9 838	9 838	3 630 098	2 206 171
52 373 589	34 595 283	77.22	69.73	15 112 681	21 514 212	44 211 453	6 535 139 000	6 578 120 000	100.69	154 440 002	42.57	1.482	1.172	73.052	49.738	84 150	46 629	11 581	16 811	5 081 656	2 797 683
2 930 254	1 347 [illegible]	98.36	73.20	Def 121 [illegible]	438 407	1 [illegible] 230	17 681 000	17 691 000	9.82	493 897	35.84	13.382	7.845	475.280	252.101	80 980	21 545	Def 21 517	21 324	210 130	142 330
84 948 869	75 003 292	73.33	68.99	17 564 446	21 130 790	24 843 848	7 130 396 000	7 280 762 000	286.20	298 817 254	34.70	1.529	1.035	36.834	25.441	45 657	25 311	7 340	8 875	3 057 859	1 695 172
33 941 432	31 442 891	67.39	64.44	10 489 596	10 919 777	24 265 187	3 498 446 000	3 498 572 000	139.30	78 466 165	47.10	1.293	0.859	60.295	40.073	55 856	33 938	12 354	12 898	4 363 131	2 651 056
101 102 657	2 041 053 094	78.84	76.95	341 859 265	515 106 414	1 084 711 098	286 588 129 000	290 379 260 000	183.69	5 716 895 091	33.27	1.939	1.106	50.815	36.052	63 088	29 462	7 345	11 187	4 130 168	1 928 744
90 638 875	2 593 352 242	77.09	69.00	481 454 338	713 001 784	1 317 736 076	356 701 304 000	361 807 227 000	196.68	7 390 892 194	35.25	1.469	1.013	50.854	35.088	62 520	29 822	7 914	11 822	4 332 025	2 073 014

Def - Denotes deficit.

• Includes nonrevenue loaded car-miles.

a Averages in columns 10, 27 and 28 are computed on road ton-miles only.
Columns 14 and 15 include the following lake or harbor transfer service ton-miles:

Road	Col. 14	Col. 15
New York, New Haven & Hartford	51 116 000	51 643 000
Chesapeake & Ohio	345 875 000	345 979 000
Ann Arbor	136 859 000	137 072 000
Grand Trunk Western	40 234 000	40 194 000
Total Eastern District	574 134 000	575 018 000

b Averages in columns 16, 18, 19, 20, 27 and 28 for Richmond, Fredericksburg & Potomac Railway (Peninsular Region and Eastern District) are computed after deducting the following: (Authorized by the I.C.C., File S-597)17)

Revenue tons carried (Col.13)	15 134 041
Revenue ton-miles (Col.14)	24 059 000
Revenue and nonrevenue ton-miles (Col.15)	24 059 000

g Averages in Columns 21 and 22 for Ann Arbor computed on following car-miles:

Rail	19 641 134
Lake transfer	4 863 167
Total	24 504 301

Association of American Railroads
Bureau of Railway Economics
Washington 6, D.C.
June 20, 1956

[fol. 229] EXHIBIT No. 5

ILLINOIS RIVER POINTS THROUGH WHICH CORN IS SHIPPED VIA BARGE AND BARGE RATES TO CHICAGO

NYC RR Stations with Grain Elevators	Approxiate highway miles to River Point	(2) Location of competing River Elevators	(3) Barge rate to Chicago, Ill. Cents per cwt. (A)	(1) Former rail rate to Kankakee, Ill. Cents per cwt. (B)	Present rail rate to Kankakee, Ill. Cents per cwt. (C)
Union Hill	28	Morris, Ill.	4.25	14.5	5
Reddick	28	Morris, Ill.	4.25	14.5	5
Blair	25	Morris, Ill.	4.25	16.5	5
Dwight	19	Morris, Ill.	4.25	18.5	5
Sunbury	18	Morris, Ill.	4.25	18.5	5
Budd	17	Seneca, Ill.	4.5	19	5
Missal	19	Seneca, Ill.	4.5	19	5
Streator	15	Ottawa, Ill.	4.75	23	5
Milla	13	Ottawa, Ill.	4.75	23	5
Lostant	12	LaSalle, Ill.	5	23	5
Priscilla	11	LaSalle, Ill.	5	23	5
McNabb	10	Spring Valley, Ill.	5	23	5
Granville	4	Spring Valley, Ill.	5	23	5
Moronts	4	Spring Valley, Ill.	5	23	5

Rail Rates subject to Ex Parte 206.

(A) Ex-barge grain has benefit of Chicago reshipping rate.

(B) Obvious local rates too high to influence rail movement in conjunction with Kankakee reshipping rates (which are same as reshipping rates from Chicago).

(C) Objective to permit involved stations benefit of Kankakee reshipping rates same as applies ex-barge from Chicago.

(1) NYC RR Tariff 701-A, ICC No. 1169, Section 4.

(2) These are the River Points to which shippers around the NYC RR stations listed in first column normally truck their Corn because of better price quotations account lower shipping costs via barge as compared to applicable rail rates to Kankakee, Ill.

(3) Rates published in the following Barge Line Tariffs:

(a) A.L.Mechling Barge Lines Inc., Tariff No. 1-B, ICC No.3, min.wt.500 net tons per barge (X)

(b) Marine Transit Company, Tariff No. 5-C, ICC No. 9, min.wt.350 net tons per barge (X)

(c) Federal Barge Lines, Tariff No. 12-N, ICC No. 39, min.wt.500 net tons per barge (X)

(d) Mississippi Valley Barge Line Co., Tariff 28-A, ICC No. 2, min.wt.500 net tons per barge. Rates include full carrier liability as per item 10 of Tariff.

(e) John I. Hay, Tariff 10-D, MF ICC No.3, min.wt. 350 net tons. Rates include insurance charges (per item 35).

(f) Blaske Lines,Inc. Tariff No. 5-D, ICC No.10, Supplement No.8,min.wt.500 net tons per barge(X)

(X) Rates do not include insurance except as otherwise stated.

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[fol. 230]

Exhibit No. 6

Supplement 52 to Tariff 245-H

EXPLANATION OF NOTES

☐ Note 20 cancels Note 20, page 8 of Supplement 44.

Application of Re-shipping or Proportional Rates From Chicago, Joliet, Kankakee, Milwaukee, Manitowoc, etc.

(a) Where reference is made to this Note, rates apply as re-shipping or proportional rates applicable on traffic reaching the re-shipping point via a rail or water transportation line that can furnish to the outbound carrier freight bill or like documentary evidence as to the origin of the traffic and rate paid to the re-shipping point. Rates also apply on through billed shipments not stopped in transit at re-shipping points subject to this application.

(b) Provided, that in no case shall the combination through rate to and from the re-shipping point via rail be less than the rate from the re-shipping point applicable on a shipment originating thereat to final destination, the difference necessary to protect such rate from the re-shipping point to be added to the re-shipping rate therefrom. (See Exception below.)

(c) In no case shall the combination through rate to and from the re-shipping point via rail be less than the single factor through commodity rate from original shipping point to final destination named herein, which shall be the minimum through rate, the difference necessary to protect such minimum through rate shall be added to the reshipping rate from the reshipping point. The provisions of Paragraph (e) will not apply in connection with application of Item 278 of tariff, as amended.

These rates are applicable on Ex-Lake shipments as of the date such shipments leave the lake port.

Number in square illegible.

These rates are applicable on shipments which arrive at Chicago, Ill., by River or Canal. The rates covered hereby are applicable as of the date from point of origin as shown on the shipping directions surrendered at Chicago, Ill.

The Ex-Lake Grain and (or) Grain Product rates will apply only on Grain and (or) Grain Products which arrive at Chicago, Milwaukee or Manitowoc via lake, also on Grain Products milled from Grain which arrives at these ports via lake. The Ex-Lake rates covered hereby are applicable as of the date shipments leave the respective points named herein.

The Ex-River or Ex-Canal Grain and (or) Grain Products rates will apply only on Grain and (or) Grain Products which arrive at Chicago, Ill., via river or canal, also on Grain Products milled from Grain which arrive at Chicago, Ill., via river or canal. The rates covered hereby are applicable as of the date from point of origin as shown on the shipping directions surrendered at Chicago, Ill.

These rates are subject to transit rules and regulations published in tariffs lawfully on file with the Interstate Commerce Commission.

Exception—The provisions of paragraph (b) as to the application of the rate on shipments originating at the re-shipping point as minima will not apply in connection with shipments moving to Chicago, Ill., via River or Canal, nor on shipments of Malt and Malt Sprouts, C. L., originating at Jefferson Junction, Wis.

[fol. 231]

EXHIBIT No. 7

Item 270 (New).

EXCEPTION TO APPLICATION OF RATES ON CORN AND PRODUCTS THEREOF

Rates named in tariff, as amended, on Grain and Grain Products from

Station Number	STATION	Station Number	STATION	Station Number	STATION	Station Number	STATION
	NYC(W)						
8220	West Kankakee Ill.						
to	to						
8230	Moreuta Ill						

will NOT apply on carload shipments of Corn and the following products produced from Corn:

Brewers' Flakes (not made from starch),
Brewers' Meal (not made from starch),
Corn Bran,
Corn Chop,
Corn Dust,
Corn Feed (ground, not the product of starch or glucose factories),
Corn Flour,
Corn Meal,
Corn Malt,
Corn Malt Sprouts,
Corn Oil Cake (ground or not ground),
Corn Oil Meal,
Corn Screenings (whole or ground),
Corn Skimmings,
Cracked Corn,
Feed, animal or poultry, prepared,
Feed, corn cereal offal (not cereal food preparations and not for human consumption),
Feed, flaked corn, toasted or not toasted (not a cereal food preparation and not for human consumption),
Gluten Feed,
Gluten Feed, sweetened,
Gluten Meal,
Grits (not made from starch),
Ground Corn,
Hominy,
Hominy Feed,
Hulled Corn,
Mash, sweet grain, dried, without or with not exceeding one per cent (1%) of Vitamin A added.

when routed via Kankakee, Ill. and milled in transit. Combination rates will apply. (D/A C1301-282.)

For explanation of reference marks, see last page of this supplement.

179295

[fol. 232]

BEFORE THE INTERSTATE COMMERCE COMMISSION

AMENDMENT TO FOURTH SECTION APPLICATION BY TRAFFIC EXECUTIVE ASSOCIATION—EASTERN RAILROADS—Filed July 12, 1957

Commission's No. 33955 July 11, 1957

E. R. No. 2386 File: C1301-383

To the Interstate Commerce Commission
Washington 25, D. C.

O. E. Schultz, Vice-Chairman, Traffic Executive Association-Eastern Railroads, for and on behalf of carriers parties to Fourth Section Application No. 33955 hereby amends said application to the extent and for the reasons shown below:

I

Amend the first full paragraphs on pages 6 and 7 of the application by changing reference therein to applications and orders, as follows:

Now reads:

"... Fourth Section Application No. 23982 (277 ICC 75), Fourth Section Order No. 16365, (Temporary)."

Change to read:

"... Fourth Section Application No. 32292, Fourth Section Order No. 18407."

In connection with Exhibit No. 7 to the application, it is desired to state for the record, that while West Kankakee, Ill. Index 8090 on the NYC RR(W), was originally shown therein, same will be eliminated as the 5½ cent proportional rate does not apply from this point and in lieu thereof Van's Siding, Ill. will be substituted. Agent Hinsch has been instructed to amend Item 279 of his Tariff No. 245-H, I.C.C. No. 4403 accordingly, at the earliest possible date.

This application is being amended due to the inadvertent showing of erroneous Fourth Section Application and Order references, indicated above by the substitution of correct [fol. 233] reference in lieu thereof. Also to explain the elimination of West Kankakee, Ill. and substitution of Van's Siding, Ill. in lieu thereof in Item 279 (Exhibit No. 7) of Agent Hinsch's I.C.C. No. 4403.

Wherefore, your applicants respectfully pray that the relief sought in the application, as hereby amended, be [fol. 234] granted. All of which is

Respectfully submitted

O. E. Schultz, Vice-Chairman, Traffic Executive Association-Eastern Railroads, Agent for Applicants, One Park Avenue, New York 16, N. Y.

* * * * * * *

Duly sworn to by O. E. Schultz, jurat omitted in printing.

[fol. 235]

180403

AMENDMENT No. 2 TO FOURTH SECTION APPLICATION BY TRAFFIC EXECUTIVE ASSOCIATION—EASTERN RAILROADS—Filed July 15, 1957

Commission's No. 33955 July 12, 1957

E. R. No. 2386 File: C1301-383

To the Interstate Commerce Commission
Washington 25, D. C.

O. E. Schultz, Vice-Chairman, Traffic Executive Association—Eastern Railroads, for and on behalf of carriers parties to Fourth Section Application No. 33955, hereby amends said application to the extent and for the reasons shown below:

I

Amend application by eliminating the last paragraph on page 5 extending into page 6 and substitute therefore the following:

"Exhibit No. 6, attached hereto and made a part hereof, is a copy of Note 20, Supplement 52 to CTB Tariff 245-H, Agent H. R. Hinsch's ICC No. 4403, which provides for the application of reshipping or proportional rates from Chicago, Joliet, Kankakee, etc., to destinations east of the Buffalo-Pittsburgh line and that the local rate need not be protected as minima in connection with shipments moving *to Chicago via river or canal.* A similar provision is carried in Note 45 of Supplement No. 37 to CTR Tariff 535-C, Agent H. R. Hinsch's I.C.C. No. 4499, naming rates from Chicago, East Joliet, Kankakee, etc. to so-called. Central Territory and Western Termini of Eastern Trunk Lines, which is attached and made a part hereof as Exhibit No. 6A, wherein local rate need not be protected as minima in connection with shipments arriving via Chicago, etc. via river or canal."

[fol. 236] Further amend the application by adding the following paragraph directly after paragraph quoted hereinabove.

"Exhibits Nos. 6B and 6C, attached and made a part hereof, are copies of Notes 20 and 45 of Supplement No. 93 to Agent Hinsch's Tariff I.C.C. No. 4403 and Supplement No. 41 to Agent Hinsch's Tariff I.C.C. No. 4499, respectively, show the changes in Exception to said notes, which became effective December 15, 1956 and provide that Kankakee, Ill. local rates need not be observed as minima on traffic from New York Central Railroad (W) stations herein involved."

Exhibit No. 6, referred to above was submitted with the original application while Exhibit Nos. 6A, 6B, and 6C are submitted with this amendment.

This amendment is being filed pursuant to telegram received from Secretary H. D. McCoy, dated July 11, 1957.

Wherefore, your applicants respectfully pray that the relief sought in the application, as amended, be granted.

[fol. 237] All of which is

Respectfully submitted

O. E. Schultz, Vice-Chairman, Traffic Executive Association-Eastern Railroads, Agent for Applicants, One Park Avenue, New York 16, N. Y.

* * * * * * *

Duly sworn to by O. E. Schultz, jurat omitted in printing.

[fol. 238]

EXHIBIT No. 6A

Supplement 37 to Tariff 535-C

EXPLANATION OF NOTES

Note 45 Cancels Note 45 (Tariff)

APPLICATION OF RESHIPPING OR PROPORTIONAL RATES APPLICABLE ON TRAFFIC ORIGINATING AT POINTS IN THE TERRITORY AS DESCRIBED BELOW

Where reference is made to this Note rates will apply as follows:

Rates subject to the provisions of this Note are reshipping or proportional rates applicable on traffic reaching the reshipping point via a rail or water transportation line that can furnish to the outbound carrier freight bill or like documentary evidence as to the origin of the traffic and rate paid to the reshipping point, and will only apply on such traffic when originating at points in the territory as described below, from which no single factor through commodity rates are in effect in connection with inbound carrier via the reshipping point from original shipping point to final destination; provided that in no case shall the combination through rate to and from the reshipping point be less than the local rate from the reshipping point to final destination nor less than the through joint rate in

effect on the commodity reforwarded from the reshipping point from origin point of the grain to final destination of the grain or grain products via any route, whichever may be the higher, the difference necessary to protect either of the above bases of rates as minimum to be added to the reshipping or proportional rate from the reshipping point. (See Exception.)

On shipments which arrive by River or Canal at Chicago, ♦ Pekin or ♦ Peoria, Ill. These rates are applicable as of the date shipments leave the point of origin as shown on the shipping directions surrendered at Chicago, ♦ Pekin or ♦ Peoria, Ill.

These rates are subject to transit rules and regulations published in tariffs on file with the Interstate Commerce Commission.

Rates also apply on through billed shipments originating at points in territory as described in this Note, not stopped in transit at reshipping points subject to this application.

Exception.—The foregoing provisions as to the application of local rates or the rate from the origin point to final destination as minima will not apply on shipments arriving at Chicago, Pekin or Peoria, Ill., by River or Canal.

[fol. 239]

EXHIBIT No. 6B

Supplement 93 to Tariff 245-H

EXPLANATION OF NOTES

□ Note 20 cancels Note 20, page 16 of Supplement 52.

APPLICATION OF RE-SHIPPING OR PROPORTIONAL RATES FROM CHICAGO, JOLIET, KANKAKEE, MILWAUKEE, MANITOWOC, ETC.

(a) Where reference is made to this Note, rates apply as re-shipping or proportional rates applicable on traffic reaching the re-shipping point via a rail or water transportation line that can furnish to the outbound carrier.

Number in square illegible.

freight bill or like documentary evidence as to the origin of the traffic and rate paid to the re-shipping point. Rates also apply on through billed shipments not stopped in transit at re-shipping points subject to this application.

(b) Provided, that in no case shall the combination through rate to and from the re-shipping point via rail be less than the rate from the re-shipping point applicable on a shipment originating thereat to final destination, the difference necessary to protect such rate from the re-shipping point to be added to the re-shipping rate therefrom. (See Exception below.)

(c) In no case shall the combination through rate to and from the re-shipping point via rail be less than the single factor through commodity rate from original shipping point, to final destination named herein, which shall be the minimum through rate, the difference necessary to protect such minimum through rate shall be added to the reshipping rate from the reshipping point. The provisions of Paragraph (c) will not apply in connection with application of Items 278 and 279 of tariff, as amended.

These rates are applicable on Ex-Lake shipments as of the date such shipments leave the lake port.

These rates are applicable on shipments which arrive at Chicago, Ill., by River or Canal. The rates covered hereby are applicable as of the date from point of origin as shown on the shipping directions surrendered at Chicago, Ill.

The Ex-Lake Grain and (or) Grain Product rates will apply only on Grain and (or) Grain Products which arrive at Chicago, Milwaukee or Manitowoc via lake, also on Grain Products milled from Grain which arrives at these ports via lake. The Ex-Lake rates covered hereby are applicable as of the date shipments leave the respective points named herein.

The Ex-River or Ex-Canal Grain and (or) Grain Products rates will apply only on Grain and (or) Grain Products which arrive at Chicago, Ill., via river or canal, also on Grain Products milled from Grain which arrive at Chicago, Ill., via river or canal. The rates covered hereby are applicable as of the date from point of origin as shown on the shipping directions surrendered at Chicago, Ill.

These rates are subject to transit rules and regulations published in tariffs lawfully on file with the Interstate Commerce Commission.

Exception.—The provisions of paragraph (b) as to the application of the rate on shipments originating at the re-shipping point as minima will not apply in connection with shipments moving to Chicago, Ill., via River or Canal, nor on shipments of Malt and Malt Sprouts, C. L., originating at Jefferson Junction, Wis., nor on shipments of Corn and Corn Products, C. L., named in Item 279 of tariff, as amended, originating at NYC stations named in Item 279 of tariff, as amended.

[fol. 240]

EXHIBIT No. 6C

Supplement 41 to Tariff 535-C

EXPLANATION OF NOTES

Note 45 Cancels Note 45 pages 3 and 4 of Supplement 38.

APPLICATION OF RESHIPPING OR PROPORTIONAL RATES APPLICABLE ON TRAFFIC ORIGINATING AT POINTS IN THE TERRITORY AS DESCRIBED BELOW

Where reference is made to this Note rates will apply as follows:

Rates subject to the provisions of this Note are reshipping or proportional rates applicable on traffic reaching the reshipping point via a rail or water transportation line that can furnish to the outbound carrier freight bill or like documentary evidence as to the origin of the traffic and rate paid to the reshipping point, and will only apply on such traffic when originating at points in the territory as described below, from which no single factor through commodity rates are in effect in connection with inbound carrier via the reshipping point from original shipping point to final destination; provided that in no case shall the combination through rate to and from the reshipping point be less than the local rate from the reshipping point to final destination nor less than the through joint rate in effect on

the commodity reforwarded from the reshipping point from origin point of the grain to final destination of the grain or grain products via any route, whichever may be the higher, the difference necessary to protect either of the above bases of rates as minimum to be added to the reshipping or proportional rate from the reshipping point. (See Exception.)

On shipments which arrive by River or Canal at Chicago, Pekin or Peoria, Ill. These rates are applicable as of the date shipments leave the point of origin as shown on the shipping directions surrendered at Chicago, Pekin or Peoria, Ill.

These rates are subject to transit rules and regulations published in tariffs on file with the Interstate Commerce Commission.

Rates also apply on through billed shipments originating at points in territory as described in this Note, not stopped in transit at reshipping points subject to this application.

Exception.—The foregoing provisions as to the application of local rates or the rate from the origin point to final destination as minima will not apply on shipments arriving at Chicago, Pekin or Peoria, Ill., by River or Canal, nor on shipments of corn or corn products as enumerated in B-6 arriving at Kankakee, Ill., by NYC from NYC Stations West Kankakee, Ill., to Moronts, Ill. (Station Numbers 8090 to 8220).

B-6. Proportional rate from Kankakee will apply on corn and on the following products in carloads without regard to the existence of single factor joint through rates from NYC stations, West Kankakee, Ill., to Moronts, Ill., inclusive and without observing such single factor through rates as minima. Combination rates using proportional or reshipping rate from Kankakee on corn and the following products are not subject to Kankakee local rate as minimum:

Brewers' Flakes (not made from starch),
Brewers' Meal (not made from starch),

Corn Bran,
Corn Chop,
Corn Dust,
Corn Feed (ground, not the product of starch or glucose factories),
Corn Flour,
Corn Meal,
Corn Malt,
Corn Malt Sprouts,
Corn Oil Cake (ground or unground),
Corn Oil Meal,
Corn Screenings (whole or ground),
Corn Skimmings,
Cracked Corn,
Feed, animal or poultry, prepared,
Feed, corn cereal offal (not cereal food preparations and not for human consumption),
Feed, flaked corn, toasted or not toasted (not a cereal food preparation and not for human consumption),
Gluten Feed,
Gluten Feed, sweetened,
Gluten Meal,
Grits (not made from starch),
Ground Corn,
Hominy,
Hominy Feed,
Hulled Corn,
Mash, spent grain, dried, without or with not exceeding one per cent (1%) of Vitamin A added.

[fol. 241]

180256

BEFORE THE INTERSTATE COMMERCE COMMISSION

PROTEST OF CARGILL, INCORPORATED OBJECTING TO THE GRANTING OF RELIEF FROM THE PROVISIONS OF THE FOURTH SECTION OF THE INTERSTATE COMMERCE ACT AS SOUGHT BY TRAFFIC EXECUTIVE ASSOCIATION-EASTERN RAILROADS IN FOURTH SECTION APPLICATION—Filed July 15, 1957

Commission's No. 33955

E.R. No. 2386

Dated—New York, New York,
June 28, 1957, File: C1301-383.

Comes now your protestant, Cargill, Incorporated, and respectfully states:

It is a corporation, organized and existing under the laws of the State of Delaware, with headquarters at 200 Grain Exchange, Minneapolis 15, Minnesota.

It has been and is now engaged in buying, selling, storing and otherwise handling and processing grain, soya beans and other commodities.

It owns and operates a grain elevator at Chicago, Illinois, having a capacity of approximately 18,000,000 Bushel, into which it draws grain and from which it re-ships grain by Railroad, Barge, Truck and Lake Steamer. Large quantities of grain have been and are being handled from the origin territory and re-shipped to the destination territory here involved and it has a vital interest in the disposition of Carriers Relief Petition.

[fol. 242] It is aware of and in sympathy with the desire of the Eastern Railroads, particularly The New York Central Railroad Company, in this instance, to establish rates to meet competition, but this laudable objective is lost in what we believe and allege to be an improper evaluation of the whole situation.

It desires to submit the following facts, upon which it relies in the request it now makes, that the afore-named petition of the Eastern Railroads, be denied.

I.

The 5 cents per one hundred pound rate (5½ cents including Ex-Parte 206 Increase) referred to in Relief Petition is not proper or necessary to meet barge competition, which allegedly inspired this rate and this ensuing application for Fourth Section relief. Since the rate itself is improper and unnecessary, relief from any provision of the Act to support or sustain such a rate, is improper and unnecessary.

The 5 cents rate referred to is not proper or necessary because no grain from the involved origin territory can move to or through Chicago, at such a rate or anywhere near such a rate. To illustrate we will take, for example, a point of origin along the line of The New York Central Railroad Company involved in the Relief Petition. Dwight, Illinois, is shown in Exhibits Number 4 and 5; it is a representative and important shipping point.

A producer of Corn in the neighborhood of Dwight, [fol. 243] Illinois, hauls his Corn into the elevator at that point. Practically all of the Corn is on the cob and it must be shelled at the country elevator.

We now have the Corn in the country elevator at Dwight, Illinois, and from here on the following charges are incurred, taking our destination to be New York, New York, which is used in Exhibit 1 of Relief Petition.

If the grain moves by truck to the river, Barge to Chicago, Illinois and Rail to New York, New York, the following charges apply:

Via Kankakee, Illinois	Cents Per One Hundred Pounds
Truck, Dwight, Illinois to Morris, Illinois, 19 miles, per Relief Petition Exhibit 5 3 cents per Bushel or - - -	5.36
Elevation at Morris, Illinois (truck into barge) 1½ cents per Bushel or - - -	2.68
Barge rate, Morris, Illinois to Chicago, Illinois	4.25
Trimming and shoveling at Chicago, Illinois, ¾ cents per Bushel, plus elevation at Chicago, Illinois, 2¼ cents per Bushel—total handling at Chicago, Illinois—3 cents per Bushel or - - -	5.36
Proportional Rail Rate, Chicago, Illinois, to New York, New York—49½ cents per one hundred pounds, plus Ex-Parte 206 increase	51.5
Total Cost Via Chicago, Illinois	69.15

[fol. 244]

Via Chicago, Illinois	Cents Per One Hundred Pounds
Rail Rate, Dwight, Illinois, to Kankakee, Illinois, applicable when milled into Corn Products—5 cents per one hundred pounds, plus Ex-Parte 206 increase.	5.5
Proportional rate, Kankakee, Illinois, to New York, New York—49½ cents per one hundred pounds, plus Ex-Parte 206 increase.	51.5
Total cost via Kankakee, Illinois	57.0

It will be observed that the total cost via Chicago, Illinois, is .1215 cents per one hundred pounds higher than via Kankakee, Illinois.

If the milling process takes place at Kankakee, Illinois, or at any other transit point enroute to New York, New York, there is another cost for unloading the Corn and loading the Corn Products but that cost is exactly the same whether the movement is via Kankakee or Chicago.

In reliance upon the foregoing statements we respectfully contend that the Eastern Carriers in their Relief Petition shall not be heard to say they are only meeting barge competition. It seems the Eastern Carriers are under the impression that somehow Corn moves free to the river landings and that there is some extraordinary way of getting Corn from Barges to Railroad cars at Chicago, Illinois, without expense. These handling costs are not included in the rate but they are just as much a part of the transportation cost as if they were included in the rate and then absorbed. All of the barge rates here involved apply from Port to Port and the loading and [fol. 245] unloading costs are in addition.

In order to reach any transit point where Corn may be milled, only one elevation is necessary when handled by railroad, but to reach the same transit point via barge, at least two elevations, and generally three, are necessary and these elevation charges must be regarded as part of the cost factors because the barge rates cannot be used without them.

II.

The Relief Petition of Eastern Carriers, on Page 10, states that based on elevator capacity at origin stations the railroads can only hope to recover 6,000,000 Bushel annually while the barge movement into Chicago, Illinois, for the year 1955, approximated 14,887,000 Bushel. This estimate may be correct at this moment but with a rate adjustment such as envisioned in this Relief Petition there should be a rapid expansion of present elevator facilities. The above estimate of 6,000,000 Bushel is based on elevator capacity at origin but there is a sizeable and important amount of portable loading equipment being used in this territory to which no reference is made. We believe the amount of grain the Railroads could recover under the rates which would be available if the Relief sought was granted, would depend only on the number of empty cars the railroads could supply.

Further, if the Railroads can recover only 6,000,000 Bushel annually because of the limited elevator capacity,

as suggested on Page 10, then it is reasonable to deduce that if there was twice as much elevator capacity the Rail- [fol. 246] roads could divert 12,000,000 of the 14,887,000 Bushel. We believe this points out quite clearly that with a rate of 5½ cents per one hundred pounds to Kankakee, Illinois, the barges, with the substantial costs in addition to their rates, would only be a factor when lack of elevator space or lack of empty cars would force the grain to the river.

III.

The rates which would be available if the Relief sought was granted would also have the effect of drawing grain off other lines. There are five north and south railroads crossing the line of The New York Central Railroad Company, in the involved origin territory. They are The Atchison, Topeka and Santa Fe Railway Company, Gulf, Mobile and Ohio Railroad Company, Wabash Railroad Company, Illinois Central Railroad Company and Chicago & Eastern Illinois Railroad Company. Corn from territory on these railroads is attracted to adjacent loading points on The New York Central Railroad Company, because of the 5½ cents per one hundred pound rate to Kankakee, Illinois. This disrupts and diverts the natural trend of movement from points on these other lines, all because of the rate of 5½ cents per one hundred pounds from these New York Central Railroad Company origins to Kankakee, Illinois, which is sought to be protected and validated by Fourth Section relief, under the guise of its necessity to meet barge competition.

IV.

The restriction in this rate to apply only on Corn, milled in transit, is unlawful under Section 3 of the Act because it [fol. 247] gives undue preference to milled products and creates undue prejudice to the commodity from which the product is milled. Corn Products are higher in value than Corn.

For example, if a miller of Corn at any Eastern destination in the involved territory, purchased Corn from a New

York Central Railroad Company point in the involved origin territory, milled it at destination and sold the products locally, he would pay the Corn rate. He would be milling at destination, not in transit. A processor at some intermediate point could purchase Corn from the same origin, mill it into products at the intermediate point, and ship the milled product to the destination at which the first named processor was located; he would only pay the materially lower rate sought by this Relief Petition, applicable on Corn, milled in transit into Corn Products.

Taking Dwight, Illinois, as an origin, we show the following example:

Corn, Dwight, Illinois, to New York, New York, milled at destination and not milled in transit, 68 cents, subject to Ex Parte 206	71.5
Corn, Dwight, Illinois to Kankakee, Illinois, when milled into products, 5 cents, subject to Ex-Parte 206	5.5
Kankakee, Illinois, to New York, New York, 49½ cents per one hundred pounds, subject to Ex-Parte 206	51.5
Total	57.0
Preference given a transit operator milling in transit, over a transit operator milling at destination—	14.5

[fol. 248] V.

Relief application seeks to legalize rates now published and effective to the Western Termini of Eastern Trunk Line Territory and East thereof, by an extension of that basis of rates to Central Territory. This would validate and perpetuate rates to the Western Termini of Eastern Trunk Line Territory and East thereof, which we allege to be unlawful under Sections 1, 3 and 4 of the Act and which rest upon the specious premise that all of this is necessary to meet barge competition.

VI.

On page ten, line sixteen, Relief Petition refers to the Fourth Section departures as "theoretical". We respectfully urge that there is nothing theoretical about these Fourth Section violations, nor is there anything hypothetical or speculative about them. They exist in reality, or they do not exist at all.

VII.

On page 1, Exhibit 1, of Relief Petition, Kankakee, Illinois, is shown as the (first higher rated intermediate origin) and via Route 1, the distance to New York, New York, is shown—907.8 miles. The local rate reference (2) is shown as 66 cents per one hundred pounds and the proportional rate reference (3) is shown as 49½ cents per one hundred pounds. Reference (3) is shown on Page 2, Exhibit 1 and the Explanation of that reference on Page 2 reads: "(3) Proportional rate beyond applying on Ex-Barge Traffic".

There can be no application of Ex-Barge rates from Kan- [fol. 249] kakee, Illinois, because it is not a point at which barges are unloaded. Further, Relief Petition, Exhibit 6, reproduces Note 20 to which the Chicago, Illinois, proportional rates are subject. Kankakee, Illinois, is shown in this Note because it too is subject to Note 20 but no reference anywhere in this Note is made as to Ex-Barge Grain reshipped from Kankakee, Illinois. Note 20 (c) paragraphs three and five make reference to Ex-Barge grain, but only on shipments which arrive at Chicago, so reference (3), wherever it appears on Page 1, Exhibit 1, is in error. Kankakee, Illinois, can avail itself of the Proportional Rates applying from Chicago, Illinois, on Ex-Barge traffic, but only when the traffic moves via Chicago, Illinois, and that means the rates so used are subject to all the charges shown in our illustration on page 3 hereof. That is the precise reason the New York Central Railroad Company publish a rate of 6 cents per one hundred pounds (subject to Ex-Parte 206), in its tariff 701-A, I.C.C. 1169 from Chicago, Illinois, to Kankakee, Illinois, as shown in the quotation near the top of Page 5 of Relief Petition.

For the foregoing reasons, your protestant respectfully repeats its requests that the Interstate Commerce Commission deny the request of the Traffic Executive Association-Eastern Railroads for the Fourth Section relief sought in its Fourth Section application hereinbefore referred to.

We also respectfully request the Commission to order the cancellation of all rates, provisions and applications in the following described tariffs, because they have been illegally in effect since their establishment, December 15, 1956 and they are now illegally in effect because they are in violation of Section 4 of the Act.

[fol. 250] (a) All rates on Corn to Kankakee, Illinois, originally established in Section 4, Page 3, Supplement 114, the New York Central Railroad Company Freight Tariff 701-A, I.C.C. 1169.

(b) All rates on Corn to Kankakee, Illinois, published in Section 4, Page 40, Supplement 122, the New York Central Railroad Company Freight Tariff 701-A, I.C.C. 1169, which is a re-issue of the rates covered by paragraph (a).

(c) All rates on Corn to Kankakee, Illinois, published in Section 4, Page 2, Supplement 126, The New York Central Railroad Company Freight Tariff 701-A, I.C.C. 1169, which is in part a re-issue of the rates covered by paragraph (a) and in part an extension of the destination territory to which the rates originally published will apply. This change in Supplement 126 is published to become effective July 30, 1957 and a request for suspension of this publication is being prepared and will be in the hands of the Commission within the time prescribed by the Rules of Practice.

(d) Item 279 (new) and the concluding part of the Exception in Note 20, which refers to Item 279, all on Page 2, Supplement 84, Central Territory Railroads Tariff Bureau Freight Tariff 245-H, I.C.C. 4403, which originally became effective December 15, 1956.

(e) Item 279 on Page 17 and the concluding part of the Exception in Note 20, which refers to Item 279 on Page 11, both in Supplement 93, Central Territory Railroads Tariff Bureau Freight Tariff 245-H, I.C.C. 4403, which is a re-issue of the provisions of paragraph (d).

[fol. 251] (f) Paragraph B-6 of Exceptions to Note 45, shown on Page 4, Supplement 38, Central Territory Railroads Tariff Bureau Freight Tariff 535-C, I.C.C. 4499, originally effective December 15, 1956 and still in effect.

The fact that carriers are now filing a request for relief from the provisions of Section 4 of the Act, is evidence and an admission that the rates, applications and provisions already in the tariffs, as referred to in paragraphs (a) through (f), are in violation of that Section. Since the Commission has the power and authority under Section 15 of the Act to order the carriers to cease and desist from these violations of the Fourth Section of the Act, we again respectfully request the Commission to exercise those powers and summarily order the carriers to cancel all rates, applications and provisions enumerated in paragraphs (a) through (f) hereof.

In conclusion your protestant desires to respectfully repeat it does not wish to deter any railroad, or any other carrier, from meeting its competition, wherever it may be found. We are always interested in purchasing transportation at the lowest cost. However, in the instant case the efforts of the Railroads, perhaps unwittingly, will tend to destroy, rather than meet, the Barge competition with which they are confronted and the inherent rights of these various Barge Lines serving Chicago, Illinois, are denied due regard and protection as guaranteed under the National Transportation Policy.

Respectfully submitted,

Bernard A. Springrose, General Traffic Manager, Registered Practitioner, 200 Grain Exchange Building, Minneapolis 15, Minnesota.

July 11, 1957

[fol. 252] Certificate of service (omitted in printing).

[fol. 253]

180835

BEFORE THE INTERSTATE COMMERCE COMMISSION

AMENDMENT TO PROTEST OF CARGILL, INCORPORATED OBJECTING TO THE GRANTING OF RELIEF FROM THE PROVISIONS OF THE FOURTH SECTION OF THE INTERSTATE COMMERCE ACT AS SOUGHT BY TRAFFIC EXECUTIVE ASSOCIATION-EASTERN RAILROADS IN FOURTH SECTION APPLICATION—Filed July 16, 1957

Commission's No. 33955

E.R. No. 2386

Dated—New York, New York,
June 28, 1957, File: C1301-383.

Comes now your Protestant, Cargill, Incorporated, respectfully requesting the Commission to refer to its Protest of July 11, 1957 above referred to.

Page 3, lines 1 and 2 read in part as follows:

"Practically all of the Corn is on the cob and it must be shelled at the country elevator".

This should read:

"Practically all of the Corn is shelled on the farm and only a small part must be shelled at the country elevator".

Your Protestant prays the Commission accept and consider its protest, with this amendment.

Respectfully submitted,

Bernard A. Springrose, General Traffic Manager,
Registered Practitioner, 200 Grain Exchange,
Minneapolis 15, Minnesota.

July 15, 1957

[fol. 254] Certificate of service (omitted in printing).

[fol. 255]

181262

PETITION OF BOARD OF TRADE OF THE CITY OF CHICAGO OF PROTEST AGAINST F. S. A. 33955—Filed July 17, 1957

Chicago, Illinois
July 16, 1957

Mr. Harold D. McCoy, Secretary
Interstate Commerce Commission
Washington 25, D. C.

Dear Sir:

The Board of Trade of the City of Chicago respectfully protests the following Fourth Section Application and hereby petitions the Interstate Commerce Commission to enter upon an investigation inquiring into the lawfulness thereof and to hold a public hearing in order that members of the shipping public and other interested parties may be heard. The Fourth Section Application referred to is designated as:

> *Fourth Section Application I.C.C. 33955,* issued by O. E. Schultz, Vice-Chairman, Traffic Executive Association-Eastern Railroads under File E. R. 2386 dated June 28, 1957 as publicized in the Federal Register Saturday, July 6, 1957.

In support of its protest, this petitioner respectfully states:

I

This petition is filed in behalf of the Board of Trade of the City of Chicago, a corporation existing by and under the laws of the State of Illinois, maintaining a grain exchange in that city where its members deal in various commodities including Grain, Grain Products, By-Products of Grain and Related Articles to which this statement is [fol. 256] directed. Its members move these commodities into and out of the market via barge and rail and are vitally interested in rates and charges affecting their traffic from origins in the State of Illinois and adjacent ter-

ritory when destined to points in the Central Freight Association Territory, Western Termini of Eastern Trunk Lines and East thereof.

II

General Statement

Fourth Section Application, I.C.C. No. 33955 dated June 28, 1957 was issued by O. E. Schultz, Vice-Chairman Traffic Executive Association-Eastern Railroads for and on behalf of carriers parties to Agent H. R. Hinsch's Tariff No. 245-H, I.C.C. No. 4403 and No. 535-C, I.C.C. No. 4499 in addition to New York Central Railroad Tariff No. 701-A, I.C.C. No. 1169. It seeks authority to maintain rates without observing thel ong-and-short-haul provision of section 4 (1) of the Interstate Commerce Act.

Some of the rates on which this delinquent relief is sought were initially published in Supplement 114 to NYC Tariff 701-A, I.C.C. No. 1169, with corresponding amendments in Supplement 84 to Agent H. R. Hinsch's Tariff 245-H, I.C.C. No. 4403 and Supplement 38 to Agent H. R. Hinsch's Tariff 535-C, I.C.C. No. 4499, on traffic destined to the Western Termini of Eastern Trunk Line Territory and East thereof, *all effective December 15, 1956.* It timely seeks relief in connection with traffic to Central Territory, other than Western Termini points, scheduled to become effective June 30, 1957 in Supplement 126 to NYC Tariff 701-A, I.C.C. No. 1169, and applying in connection with rates published in Agent H. R. Hinsch's Tariff 535-C, I.C.C. No. 4499.

[fol. 257] This petitioner has today filed, concurrently with this protest a petition for investigation and suspension of Supplement 126 to New York Central Tariff 701-A, I.C.C. No. 1169, for reasons stated therein, and will hereinafter consider the above entitled Fourth Section Application 33955 and its effect on the origin territory in Illinois, and adjacent territory, to the entire Central Freight Association Territory, Western Termini points, and points in the Trunk Line and New England Territory. For the purposes of this protest, this petitioner will consider the entire destination territory as a whole *assuming, for the sake of convenience,* that rates in Agent H. R. Hinsch's Tariff 535-C,

I.C.C. No. 4499 are already in effect. This is not to be construed in any manner as an acceptance of the rates scheduled to become effective July 30, 1957, in Supplement No. 126 to NYC Tariff 701-A, I.C.C. No. 1169, but seek to disregard, in point of time, the effectiveness and we still firmly adhere to all contentions enumerated in our petition of suspension filed concurrently herewith. Before inquiring into the individual aspects of this protested Fourth Section Application, insofar as its unlawfulness is concerned, we consider it in general terms. The predominant theme throughout is the New York Central's desire to meet barge competition and refers in over twenty instances to *barge competition on corn. While corn is mentioned constantly* throughout the entire application, we call the Commission's attention to the fact that *the rates involved in this Fourth Section Application only apply on Corn Products.* As will be hereinafter shown, by tariff reference, these competitive rates do not apply on Whole Corn, in its natural state, but [fol. 258] are limited to apply only on Corn Products reaching final transit destination. Corn *must be manufactured or processed in transit* in order to gain their use, *thereby limiting the application to a select group of commodities.* When the New York Central refers to barge competition, they have only undertaken to meet a small segment thereof in behalf of a *select class of shippers* under which gross unjust discrimination arise.

We wish to state at the outset that we believe rail carriers are entitled to meet competition *provided it is done in a lawful manner,* not in contravention to the Transportation Policy or the Interstate Commerce Act. The rates here protested violate several sections of the Act, as will hereinafter be shown. We further agree that if competition is met in a lawful manner, to be effective there must be relief from the application of the through rates from origin to the entire Central and Eastern Territory; relief from the flat-rate provisions applicable at the proportional or re-shipping points; and adequate Fourth Section Relief. This is based on the premise that rates, so filed to meet the competition, are in full compliance with the Interstate Commerce Act.

It will be noted throughout this entire application that the New York Central seeks to originate traffic on their

Kankakee Belt Line between Moronts, Illinois and Van's Siding, Illinois and move same through Kankakee direct to the East on their own railroad, per exhibit 1 attached thereto. It is obvious in paragraph 2, page 3, that they only seek relief from the flat rate at *Kankakee* and that nowhere in the application is there any mention of similar relief sought via the Chicago gateway. The showing in [fol. 259] exhibit 1 relative to typical fourth section departures is meager indeed. The departures that arise in a four-state area will be commented upon later.

On page five of the application, reference is made to meeting competition moving through the Chicago gateway on Barge-Rail traffic to the East by publishing rates to and from Kankakee to meet that competitive situation. *Chicago is the barge unloading port* which is also served by the New York Central on which they have refused to meet competition *where it actually exists, thereby discriminating directly against the very interchange point on which their entire proposition is based.* As stated, we are wholeheartedly in favor of railroads endeavoring to meet competition on a lawful basis, but when they *discriminate against certain classes of traffic, gateways or markets, or manufacturers or processors,* then the Interstate Commerce Commission must investigate and restrain them.

Page 7 of the application states that it was concluded that no additional relief was necessary and publication was accordingly made. The interpretation on which they relied is erroneous, probably rendered under an incomplete statement of the facts. Thousands of cars have moved on the rates that became effective December 15, 1956, on which there has not been proper Fourth Section Relief and those rates should be cancelled and be inoperative pending the outcome of this proceeding. It is important that members of the shipping public are not further injured by these unlawful rates. To prevent irreparable damage, we believe the Interstate Commerce Commission should, under powers [fol. 260] provided in section 15 of the Interstate Commerce Act, order immediate cancellation of the December 15, 1956 rates, on one day's notice, until this entire matter has been settled to its satisfaction. There is no such thing as a "technical fourth section departure". *It either is or it isn't.*

On page 10 in paragraph 2, it is stated "Through the continuation and publication of the 5½¢ rate to Kankakee as a proportional rate *applicable only on corn milled in transit*, the involved railroad, the New York Central, is able to recapture a share of the corn movement." *For the first time* in the entire application it is specifically stated exactly what the New York Central is driving at. Namely, *they want to recapture a share of the Corn movement only to the extent that it will apply on Corn ultimately "milled in transit"*. They should be called upon to justify why Corn Products is the only thing that is subject to barge competition *and why they have purposely excluded from the application of the competitive rates Whole Corn in its natural state.*

While page 10 contains a prayer for the Commission to expedite the handling of this application, we respectfully urge that this untenable situation be investigated in its entirety and require the New York Central *to justify each and every point in question.*

III

Chronology of 5¢ N.Y.C. Rate

In order that the Commission may have a complete understanding of the background of the competitive rates involved in Fourth Section Application No. 33955, we have [fol. 261] reproduced in Appendix A, attached hereto, the entire handling through various Rate Committees up to the time of publishing the original rates on December 15, 1956. Later pages therein will show the amendment sought to become effective July 30, 1957, together with some of the things that transpired between December 15, 1956 and July 30, 1957.

The first two sheets in Appendix A are maps showing the line of the New York Central in order that its general location will be known in light of the statements hereinafter made. Map "A" is a section of Northeastern Illinois showing the Kankakee Belt Line of the New York Central from Moronts, Illinois to Kankakee, Illinois, together with the water route of the Illinois Waterways on which the alleged

competition exists. Map "B" is an enlarged section of the same map emphasizing the line of the New York Central between Moronts and Kankakee in order that close examination can be given to the individual origins and cross-country stations on other railroads.

Pages 1 to 9, inclusive, of Appendix "A" show the chronology of committee handling prior publication on December 15, 1956, and to which we now turn our attention.

Page 1 is a copy of I.R.C. Application 503-195, dated June 18, 1956, wherein the New York Central sought a proposed rate of 5¢ per 100 pounds (X-196) on Corn from stations on their Kankakee Belt Line to Kankakee, Illinois containing provision that the rates were to be "subject to milling in transit" and appropriate tariff amendment sought to provide for non-application of existing through rates [fol. 262] where combination rates would be lower. The application, on the face of it, applies on *Corn, carloads*, and subject to milling-in-transit. Throughout the years, most competitive rates have been published on *whole grain* to meet barge competition and were not limited to grain milled in transit because carriers maintained that water competition was only on the whole grain. If a carrier wanted to depart from that general position and wanted to also include Corn Products it would publish an application to apply on Corn, carload, subject to milling in transit exactly the same as appears here. As will hereinafter be shown, the rates actually published though, only applied on Corn Products. Therefore, the commodity description at the head of the application is misleading. Construed literally, if rates were only to apply on Corn Products, the generic commodity description would so read. We call attention to "Fourth Section relief to be obtained". *There was no question in the mind of the proponent but that Fourth Section Relief was necessary.* To depart from that original contention, there must be some compelling reason. On page 2 it will be noted in the second paragraph, that the milled products involved were only five in number, namely, corn grits, corn meal, corn flour, hominy feed, and brewers flakes. Apparently, the products of an individual shipper were desired and not designed to meet *"like with like"* as

alleged at the bottom of page 9 in the Application. *Throughout this entire proposal, reference is made time and again to the barge competition on Whole Corn, yet it seemingly was proposed to apply on only five selected Products of Corn.* It would appear that in order to get a ridiculously low level of rates on five selected commodities for an indi- [fol. 263] vidual shipper, the proponent carrier used as an excuse existing barge competition. It is further apparent that in considering the competitive level, the proponent carrier looked only to barge rate from the river landing to Chicago and gave no consideration to other costs incidental to a truck-barge-rail movement from origin to eastern destinations.

Page 3 shows that I.R.C. Application 503-195 was not originally recommended; page 4 that I.R.C. Application 503-195 was listed for review by the Illinois Freight Association Traffic Executive Committee under Emergency Docket 4826; and page 5 that consideration by the Executive Committee approved the docket as recommended.

Page 6 is Determination Advice E. C. 596, showing that the 5¢ rate was recommended by the Traffic Executive Committee. It will be noted thereon that *"Fourth Section Relief to be obtained by the NYC(C) RR"*.

Page 7 shows the circularization of Determination Advice E. C. 596 to the Western Trunk Line Committee, indicating that unless objections were recorded by September 7, 1956, that the members thereof would be considered as concurring therein.

Page 8 is the Determination Advice No. C-1301-383 of the General Freight Traffic Committee-Eastern Railroads dated October 31st, wherein the Eastern Railroads concurred in the application of 5¢ combination to Western Termini of Eastern Trunk Lines and east thereof. Page 9 is a memorandum which came to us attached to the Eastern Railroads advice No. C-1301-383 indicating the basis on which the New York Central concluded that no additional [fol. 264] Fourth Section Relief was necessary. It will be noted that this was the result of a telephone conversation made with Mr. Robert Newell, Chairman of the Fourth Section Board and upon which the New York Central placed

their entire confidence abandoning their original position that Fourth Section Relief was necessary. In our opinion, Mr. Robert Newell misunderstood the facts or did not receive the entire factual picture in coming to his conclusion. As will be noted on page 8, no reference to Fourth Section Relief was made on the Determination Advice and they proceeded with publication thereon. Concluding with page 9 of the Appendix, we leave the preliminary handling of this matter through the Committees and turn to the actual tariff publication of the competitive rates which became effective December 15, 1956.

Pages 10 to 12, inclusive, is a complete showing of Supplement 114 to New York Central Tariff 701-A which became effective December 15, 1956. Page 3 shows publication of a 5¢ (X-196) rate from the enumerated New York Central origins to Kankakee subject to route 1, the New York Central direct, also subject to circle references 399 and 400. An examination of page 11 shows page 2 of the tariff wherein circle 399 indicates that the 5¢ rate is an X-196-A rate in effect at the time of the publication. Circle 400 shows that the rates apply on Corn and Corn Products when *milled in transit* and only as the proportional rate to Kankakee, Illinois on traffic destined to the Western Termini of Eastern Trunk Lines and east there thereof, and subject to transit rules and regulations published in tariffs lawfully on file with the Interstate Commerce Commission. At this point, we note that the generic heading of the rates on page 3 of [fol. 265] the tariff read: "*Corn*, as per grain list in section 1 of Agent H. R. Hinsch's Freight Tariff No. 600-H, I.C.C. No. 4644," while circle reference 400 on page 2 applies only on Corn and Corn Products "when milled-in-transit". Therefore, we have a "gathering rate" tariff by a western carrier publishing a component part of a combination through-joint rate wherein the first rate factor is limited in its application to certain traffic, thereby projecting the restriction upon proportional tariffs used in connection with the 5¢ rate. As will be explained later, the eastern tariffs naming the proportional rates from Kankakee to the Western Termini and points East thereof, have been for many years without limitation or restriction. It is an unlawful projec-

tion of an individual railroad's control over all of the eastern proportional rates. Therefore, there are three basic things wrong with Supplement 114, namely, the 5¢ rate is too low, there is a discrimination against the use of those rates on Whole Corn, and an unlawful exercise of control over the destination proportionals under a "rate-break" system of rates.

Pages 13 to 15, inclusive, show amendments made to CTR Tariff 535-C, I.C.C. No. 4499, effective December 15, 1956, to take care of the eastern factor operative in connection with the 5¢ gathering rate. On page 3 of the tariff, it will be noted by the underscored language, unless otherwise provided, that the proportional rates will apply only on traffic originating at points from which no single-factor through commodity rates are in effect, but not less than the local rate from the re-shipping point to final destination. We agree relief from these provisions are necessary in [fol. 266] connection with the establishment of a combination of low competitive rates to destination territory, assuming of course, that competitive factors are in full compliance with the law.

Page 4 contains a paragraph B-6, which provides that proportional rates from Kankakee will apply on *Corn and Corn Products* without regard to the existence of the single-factor joint through rate from stations West Kankakee to Moronts, Illinois, and are not subject to the Kankakee local rate as a minimum. It will be noted that there is no restriction in note B-6 requiring the commodity to be "milled-in-transit". C.T.R. Tariff 535-C thus continues in effect with no limitation or restriction on its proportional rates on Grain and Grain Products as a separate established proportional rate factor. At this point, we note how the restriction "when milled-in-transit" contained in New York Central Tariff 701-A in Supplement 114 thereto, places a limitation upon the proportional rates in C.T.R. 535-C without the latter tariff carrying, within its covers, the same provisions. It might be stated at this point that *Western Termini points* are published in C.T.R. Tariff 535-C and, therefore, this tariff was involved in the original application. The balance of the Central Territory was not included

in Supplement 114 to New York Central Tariff 701-A and, therefore, the use of CTR Tariff 535-C was initially limited to the Western Termini points as final points of destination.

Pages 16 and 17 show the title page and excerpt from Supplement 84 to C.T.R. Tariff 245-H, I.C.C. No. 4403, effective concurrently with New York Central Tariff 701-A [fol. 267] on December 15, 1956. Page 2 thereof shows in paragraph (b) of Note 20 that the flat rate from the re-shipping point to final destination must be protected. Paragraph (c) requires that single-factor through commodity rate must be observed as a minimum if it is higher than a combination that would arise under the tariff. Relief from both minimum rate provisions have been taken care of by an exception in connection with item 279 which shows at the bottom of the page as a new item, New York Central (W) stations West Kankakee, Illinois to Moronts, Illinois, inclusive, on *Corn and Corn Products,* "when milled-in-transit". At this point we see how tariff C.T.R. 245-H, publishing the proportional rate from Kankakee to the East, has the restriction "when milled-in-transit" published within its covers, thereby carrying the limitation therein *and not controlled by extraneous restrictions* by the New York Central in Tariff 701-A. This has resulted in a preferential treatment to Corn Products on basis lower than on Whole Corn, in its natural state, which is unjustly discriminatory in violation of section 3 of the Interstate Commerce Act. Again, we reiterate, an exception to the flat rate from the re-shipping or proportional rate point to final destination and relief from the through rate is necessary in order to meet competition, *but to limit relief from those two minimum rate provisions on a select class of traffic is in violation of the law.*

Page 18 is the title page to Supplement 120 to New York Central 701-A and page 19 of page 2 of that supplement, showing that effective March 24, 1957, the New York Central sought to restrict routes in their gathering rate tariff so the 5¢ proportional rate from Kankakee, Illinois to destina- [fol. 268] tions in Eastern Territory would not route via Chicago. Therefore, they not only exercised control over

the eastern proportional rates insofar as limiting the movements to "when milled-in-transit", but in Supplement 120 additionally *sought to control the routing* via which those eastern proportional rates could apply. Page 20 is the title page to supplement 121 and page 21 is page 2 of the supplement, wherein effective March 24, 1957, the New York Central removed the restriction against the Chicago market contained in Supplement 120 and effective the same date as Supplement 120 was to become operative.

Considering now that the 5¢ rate which originally became effective December 15, 1956, has been in effect for several months, the New York Central now seeks to expand the destination territory to include the Central Territory. Section 5a of the Interstate Commerce Act has not been complied with. The first advice that we had of any consideration of expanding the territory into the Central Territory was through the "grapevine" on May 22, 1957, when we wired Mr. E. V. Hill of the Central Territory Railroads as follows:

> "Regarding Subject 20 May 23rd docket under your File G-4354 corn and corn products via Kankakee to Central Territory and origin fourth section relief, we request no action be taken and public hearing be permitted to allow grain trade to express its views with regard to this subject matter."

In other words, we heard about the matter one day before a hearing was held in Chicago by the Central Territory [fol. 269] Railroads and were denied the opportunity of presenting our views in accordance with the rules of procedure applicable to the eastern railroads. This matter was never docketed before the Illinois Freight Association as was the original proposal, I. R. C. D.-503-195, as shown on page 1 in Appendix A, nor before the Western Trunk Line Committee as was done in the original proposal under WTL Application 21-4388, shown on page 7 therein. Further, the matter was not publicly docketed before the eastern railroads and only after its approval were we able to get from a friendly carrier a copy of the Determination Advice shown on page 22. This, however, was received days after

the tariffs were received. All of this procedure was in violation of section 5a of the Interstate Commerce Act and at no time did the shipping public or other interested parties have an opportunity to appear before the carriers in a Committee action and present their views in the matter.

Pages 23 and 24 are reproductions of Supplement 126 to New York Central Tariff 701-A, separately protested here and petition filed for suspension thereof for the reasons stated therein. Page 23 is the title page, and page 24 a reproduction of page 2 underscoring "Central Territory". This is an expansion of the original 5¢ combination basis to apply to the Central Territory in addition to the Western Termini of Eastern Trunk Lines and points east thereof. As previously stated, we are for the purposes of this showing, making no special point of the addition of the Central Territory standing alone, since that matter is considered in [fol. 270] full in our petition of suspension concurrently filed with this protest.

We have here taken the entire history of the New York Central competitive rate situation from its inception on June 18, 1956 down to the most recent addition shown in Supplement 126 to NYC Tariff 701-A now scheduled to become effective July 30, 1957, for the Commission's examination.

IV

Unfair and Destructive Competitive Practices

The National Transportation Policy states in part, "It is hereby declared to be the National Transportation Policy of Congress . . . to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantage, or unfair or destructive competitive practices; . . .".

The existing rates on which Fourth Section Relief is here sought does this very thing. The establishment of a 5½¢ (X-206) rate from Moronts, Illinois to Kankakee, Illinois for 83½ miles requires close examination. The New York Central maintains that 5½¢ is necessary to meet barge competition which they claim *exists in equal effect* throughout the entire 83½ miles. This is not true. We have only

had an opportunity to examine the competitive situation in Illinois to a limited extent and find that the establishment of a 5½¢ rate by the New York Central has amounted to an *"unfair and destructive competitive practice"*. Because of [fol. 271] the difficulty in obtaining this evidence, we are not able at this moment to show the complete competitive situation to the Commission. We respectfully request a public hearing at which time the Chicago Board of Trade will undertake to show in a comprehensive manner, the competitive situation along the New York Central and the adjacent territory. A competitive railroad like the Gulf, Mobile and Ohio Railroad, for example, serving Dwight, Illinois, is confronted with one thing when it desires to meet barge competition but *something altogether different arises* under tariffs here protested because of the New York Central's unduly low rate from Dwight to Kankakee. Existing barge competition might dictate a reduction of four or five cents in the present G.M. & O. rates, but the 5½¢ New York Central rate requires an impossible 12½¢ reduction. By establishing a 5½¢ rate from Moronts and all intermediate points to Kankakee, the New York Central is erecting an exclusive "conveyor belt" over which the grain moves to the exclusion of every railroad operating in the territory and to the barge lines who seek their fair place in the transportation picture. The admonitions in the Transportation Policy enacted by the Congress of the United States prohibits this type of competition made on the thin allegation that that level is necessary to attract the business. The New York Central has published a rate far lower than necessary to fairly compete with other modes of transportation, ignoring completely the economic status of other railroads operating in the territory, and the shipping public dependent upon them. Furthermore, they have limited the use of [fol. 272] this low rate to a particular type of traffic, namely, Products of Corn, and thereby discriminate against Whole Corn in its natural state.

Cases before the Commission and the Courts in this regard show:

Competition and rate making: "The Commission has the power and jurisdiction to restrain rail rate reduc-

tions when necessary to enforce compliance with the national transportation policy."—Atlanta & St. A.B. Ry. Co. v. United States, 104 F. Supp. 193 (198)*.

"The Commission is charged with the specific duty to preserve the inherent advantages of each mode of transportation subject to provisions of the act, and *to prevent and eliminate unfair and destructive competition not only within each form*, but also between and among the different forms of carriage."—Sugar Cases of 1951, 284 I.C.C. 333 (351) [Citing 321 U. S. 194]; Southwestern Tank-Truck Carriers Committee v. Abilene & S. Ry., 284 I.C.C. 75 (82, 85).

"Establishment of proposed rate, *which is lower than the overall cost of water movement*, would be lower than necessary to meet water competition, and would constitute an unfair competitive practice."—Aluminum, Point Comfort, Tex., to East Davenport, Iowa, 283 I.C.C. 85 (91).

"Being lower than necessary to meet tank-truck competition proposed rail rates would result in an undue burden upon respondents' (rail carriers) other traffic. The problem is to arrive at an adjustment which will square the national transportation policy and other provisions of the act, and be fair to both forms of transportation."—Petroleum Products in Illinois Territory, 280 I.C.C. 681 (691).

Again, we reiterate, that showing the competitive situation on grain from as many origins as are involved in Illinois is not readily available. It is a sizeable undertaking to gather this factual data together, not possible in time for this writing, but if a reasonable time is allowed for a public hearing this protestant will undertake a comprehensive competitive presentation for the Commission's examination.

[fol. 273] °V

Minimium Rate Provisions Under Transit

Pages 25 to 29, inclusive, in Appendix A attached are excerpts from several tariffs showing the minimum rate provisions that arise under transit and the effect thereof under the New York Central's competitive rate of 5½¢ per 100 pounds to Kankakee on which they limit the application of the reduced basis to apply only on Corn Products.

Page 25 is the title page to New York Central Tariff 10705-E, I.C.C. No. 1798, indicating that the tariff covers rules and charges governing transit privileges on grain, grain products and other commodities in carloads at Buffalo, New York. Page 26 is a reproduction of page 8 showing in Item 630, paragraph (a) "the through rate to be applied from point of origin to final destination will be the lawfully published rate in effect via the transit point at time of initial shipment *on the commodity covered by the inbound billing* matched against the outbound shipment ..." Paragraph (d) states, "In no case shall the rate on a shipment be less than the lawful rate from point of origin to the transit point, plus the transit charge, nor less than the lawful rate from the transit point to final destination, plus the transit charge, *whichever is higher.*" A combination of these two provisions means that the through rate would be that applying on Corn, the inbound commodity, from point of origin to final destination. Therefore, it requires the protection of the *higher Corn rate* from point of origin to final destination if transit is received at Buffalo and processed into Corn Products ultimately destined to points [fol. 274] in the Eastern Territory. This results in a sizeable penalty to the transit operator at Buffalo, New York as compared to the transit operator located at Kankakee, Illinois, who is not bound by such minimum rate rule.

Page 32 of Appendix A is a statement of Whole Corn rates and Corn Products rates from Moronts, Illinois to various destinations in the eastern territory on the New York Central, Pennsylvania and Erie Railroads. Under the 3-way rule arising under transit, we note that the rates from Moronts to Buffalo, New York on Whole Corn is 64¢ per 100 pounds. Thus the rate a processor at Buffalo would

pay on the whole grain moving from origin into his transit station when he processes the Corn at Buffalo and sells the products to Rochester, New York, the through Corn Products rate of 51¢ applies *subject to the rate on the Whole Corn from origin to Buffalo as a minimum.* This minimum rate provision results in a penalty to the Buffalo transit operator of 13¢ per 100 pounds while his competitors located farther west in the Central Territory would not have such a penalty accrue. A myriad of different situations result in the protection of the "3-way rule" and the "minimum rate rule", under transit, and vary from point to point. This cannot be shown in its entirety at this moment, but the Chicago Board of Trade will undertake to make an extensive study for presentation to the Commission at the public hearing, if one be granted. An examination of page 31 shows [fol. 275] the minimum rates that would obtain into any of the transit points shown on whole corn in the first column, whereas the through rate on grain products might accrue to other transit operators differently located.

Page 27 is an excerpt from Pennsylvania Railroad Tariff 200-B, I.C.C. No. 2900, wherein the underscored portion provides that the through rate will be on the commodity shipped into the transit point or out of the transit point, *whichever is higher,* and in no case will the through rate be less than from point of origin to the transit station or less than the rate from the transit point to final destination, whichever is higher. Therefore, transit operators operating under this tariff would have to apply the through rate, the higher basis applicable to Whole Corn, and not be entitled to the low rates published in New York Central Tariff 701-A, as are other transit operators which protect the low corn products rates published therein.

Page 28 is an excerpt from New York Central Tariff 10706-B, I.C.C. No. 1752, wherein Item 815 therein requires a payment of a through rate based upon the inbound or outbound commodity, *whichever is higher,* but does not require the observance of the minimum rate from origin to transit station or transit station to transit destination except to a limited extent.

Page 29 of the Appendix is a reproduction of page 22 of N.Y.C. & St. L. Tariff 102-Z, I.C.C. No. 6268, stating that

the through rate to be applied to transit grain shall be the [fol. 276] *lawfully published rate through from original point of shipment to final destination* in effect via the transit point at the time of initial shipment from point of origin applicable *to the commodity covered by the inbound billing.* Unless otherwise stated in the tariff, it would require an observance of the through rate applicable on Whole Corn *without the minimum rate rule from point of origin to the transit station or from transit station to transit destination,* also previously referred to.

Therefore, the transit tariffs long in existence have two general minimum rate provisions. Namely, one stating that the through rate to be protected on a transited shipment will be that applying on the commodity received into the transit station or that forwarded from the transit station *whichever is higher,* and secondly that in no case shall the through rate be less than the rate from origin to transit or transit station to transit destination, whichever is higher. *The transit circulars in the East are not uniform,* some contain one of the provisions, some the other provision. At some transit stations neither provision is shown, while at other instances, both provisions are shown. Therefore, when whole corn and corn products are treated separately and are accorded widely different levels of rates, serious penalties can accrue to transit operators throughout the entire territory. It should be noted that prior to the New York Central according a different level of rates, grain products throughout the Trunk Line and New England Territory were but ½¢ higher than the prevailing grain rates. This was a relationship that stood over many years and at most, [fol. 277] the minimum rate rules could only be effective to the extent of a ½¢ difference, whereas under the New York Central 5½¢ rate to Kankakee, differences as high as 18½¢ result.

Manufacturing, milling and processing under transit are vital to the grain industry whose members must be on an equal basis in drawing grain from the same origin territory and selling competitively at destination. The wide variation of transit rules of the different railroads under the wide disparity of rates created by the New York Central disrupt this equality. Two railroads serving the same

transit station may have rules of such different character that one processor is at a complete disadvantage to his competitor. We here ask the Interstate Commerce Commission to order cancelled New York Central unlawful competitive rates pending a final determination of this matter.

VI

New York Central's Discrimination Against Chicago

Reference has been made to the attempt on the part of the New York Central to discriminate against the Chicago market and gateway in Supplement 120 to New York Central Tariff 701-A, shown on page 18 scheduled to become effective March 24, 1957. We would like at this point to examine the action there taken and the attempt that might be here made to abolish this equality and place Kankakee in a preferred position. Page 30, in exhibit A attached hereto, is a statement of rates on the Kankakee Belt Line of the New York Central to Chicago and to Kankakee, [fol. 278] Illinois, under Ex Parte 206. It will be noted that in the column headed "Other" and those appearing opposite the reference mark (1) have the same rate to Chicago from Moronts, Ill., to Budd, Ill., inclusive, as apply to Kankakee appearing in the last column. Prior to December 15, 1956, therefore, the rates from those origins to the East were equal combinations over Chicago or Kankakee and have been so related for many decades. On that date, new combinations without Fourth Section Relief, were made over Kankakee using the 5¢ (X-196) rate to the re-shipping point plus the proportional rate beyond, whereas, the full combination over Chicago was still the high rates shown on page 30 of the appendix referred to above, which are unreasonable in violation of section 1, unduly discriminatory and unjustly preferential in violation of section 3 of the Interstate Commerce Act. There is no justification for a 2¢ rate to Chicago, *the actual competitive barge unloading port* wherein a distance of 158.4 miles of the N.Y.C. is involved, and concurrently maintain to Kankakee, Illinois to which there is no barge competition, a 5½¢ (X-206) rate for 83.5 miles. It is unreasonable violating section 1 of the Act.

VII

Fourth Section Departure Territory

The scope of the origin territory departures involved in the Fourth Section Application in connection with the rates into the Trunk Line and New England Territory is very large and not susceptible to a full showing at this writing. Maps portraying this origin territory will be undertaken [fol. 279] by the Chicago Board of Trade and presented at the hearing, if granted, so the Commission can be fully informed of the extent to which the low level of rates published in New York Central Tariff 701-A are operative. A cursory examination of the situation reveals that it embraces *a four state area* and is of such magnitude that the Commission will desire the complete information in detail. There is presently assigned for hearing in Kansas City an extensive hearing to last at least one week under Southern Governors complaint Docket 31874, in which the rates on grain and grain products and related articles throughout the entire country are involved and this protestant is obliged to actively participate in that hearing and, therefore, unable to devote full time and attention to this New York Central rate situation. Therefore, we pray that the Commission will see fit to enter upon an investigation of this Fourth Section Application and assign the matter for public hearing to permit all interested parties to submit facts necessary to fully appraise the Commission of the matter in controversy.

VIII

Importance of an Investigation

Much has heretofore been said relative to "unfair and destructive competitive practices" in violation of the National Transportation Policy that arise under the establishment of a 5½¢ rate to meet barge and truck competition. Injured parties located throughout the state of Illinois in personal possession of facts relating to the competi- [fol. 280] tive situation will attend the public hearing, if granted, to inform the Commission of the evils arising out of an unduly low level of the rates. This factual information is only *within the personal knowledge of* producers,

elevator operators and grain merchants located on other railroads in the territory adjacent to the New York Central's Kankakee Belt Line who have substantial investments in grain facilities which have depreciated in value for the forwarding of rail shipments entirely due to the cross-country competition that has arisen from this destructive type of rate construction. These interested parties should have the opportunity to appear before the Interstate Commerce Commission and express their views in this matter so vital to their continued existence in the grain business. They cannot all be reached in time to submit their views in writing, and would not be able to fully express themselves in writing regarding all facets of their problem. In order to give these rural agriculturalists a fair opportunity to air their grievances, the Commission should enter upon an investigation assigning the matter for public hearing in Chicago, Illinois, a point convenient to them.

IX

Cancellation of Existing Rates

The continued existence of the 5½¢ rate combination over Kankakee, Illinois which became effective December 15, 1956, is in violation of sections 1, 2, 3, 4 and 6 of the Interstate Commerce Act and should be cancelled by the Interstate Commerce Commission pending the outcome of [fol. 281] this proceeding. Their existence is dependent upon Fourth Section Relief, here under consideration, and that relief should not be granted until there has been a full and complete hearing thereon and the lawfulness of the 5½¢ rate determined. Until that determination is made, the existing unlawful rates should be cancelled to prevent irreparable injury to the future users thereof until such time as it can be conclusively determined that competitively it is within full compliance of the law. The New York Central confesses in their application for Fourth Section Relief that the rates effective December 15, 1956, do not have proper relief and are thus without lawful existence *and, under these admitted statements of fact,* we maintain they should be cancelled immediately. In our opinion, the Interstate Commerce Commission has no alternative but to exer-

cise its duty to cancel these rates since the Act that provides in section 15 "the Commission . . . shall make an order that the carrier or carriers shall cease and desist from such violations to the extent to which the Commission finds that the same does or will exist". The rates in question are illegal by the New York Central's own admission in Fourth Section Application 33955 and we request the Commission to order those rates cancelled.

X

Conclusions

In our opinion, rail carriers should have the opportunity of meeting their competition at a fair level of rates that are not "unfair and destructive competitive practices" in [fol. 282] violation of the National Transportation Policy; nor should they be so low as to cast the burden of their existence on other forms of traffic in violation of section 1; should not be prejudicial or discriminatory favoring some markets or gateways over others, or select shippers over others; and last but not least, favor some commodities over others, in violation of section 3 of the Interstate Commerce Act. In meeting the competition, the rates should be reasonably compensatory for the service rendered; consistent with the public interest; will foster sound conditions in transportation among the several carriers; without unjust discrimination, undue preference or advantage; or unfair or destructive competitive practices. The rates involved herein are contra to these admonitions enumerated in the Interstate Commerce Act and the New York Central Railroad Company should be called upon in an investigation proceeding to justify them.

[fol. 283]

Prayer

Wherefore, the petitioner prays that the Fourth Section Application herein protested be the subject of an investigation by the Interstate Commerce Commission, and that a public hearing be assigned at Chicago, Illinois, for the purpose of permitting all shippers and interested parties to appear and fully present their case in opposition to it. In addition, this petitioner specifically requests that the exist-

ing rates from the New York Central origins to the Western Termini of Eastern Trunk Line Territory and points east thereof which became effective December 15, 1956, be ordered cancelled by the Interstate Commerce Commission to prevent their unlawful continuance pending the outcome of this proceeding.

Respectfully submitted,

Board of Trade of the City of Chicago, R. D. Erickson, Assistant Manager, Transportation Department, J. S. Chartrand, Of Counsel, Transportation Department, 141 West Jackson Boulevard, Chicago 4, Illinois.

Dated at: Chicago, Illinois, July 16, 1957.

Certificate of service (omitted in printing).

[fol. 286]

APPENDIX "A"

TO

PROTEST FILED BY

BOARD OF TRADE OF THE CITY OF CHICAGO

TO

FOURTH SECTION APPLICATION NO. 33955

FILED BY

AGENT O. E. SCHULTZ, VICE-CHAIRMAN

TRAFFIC EXECUTIVE ASSOCIATION
EASTERN RAILROADS

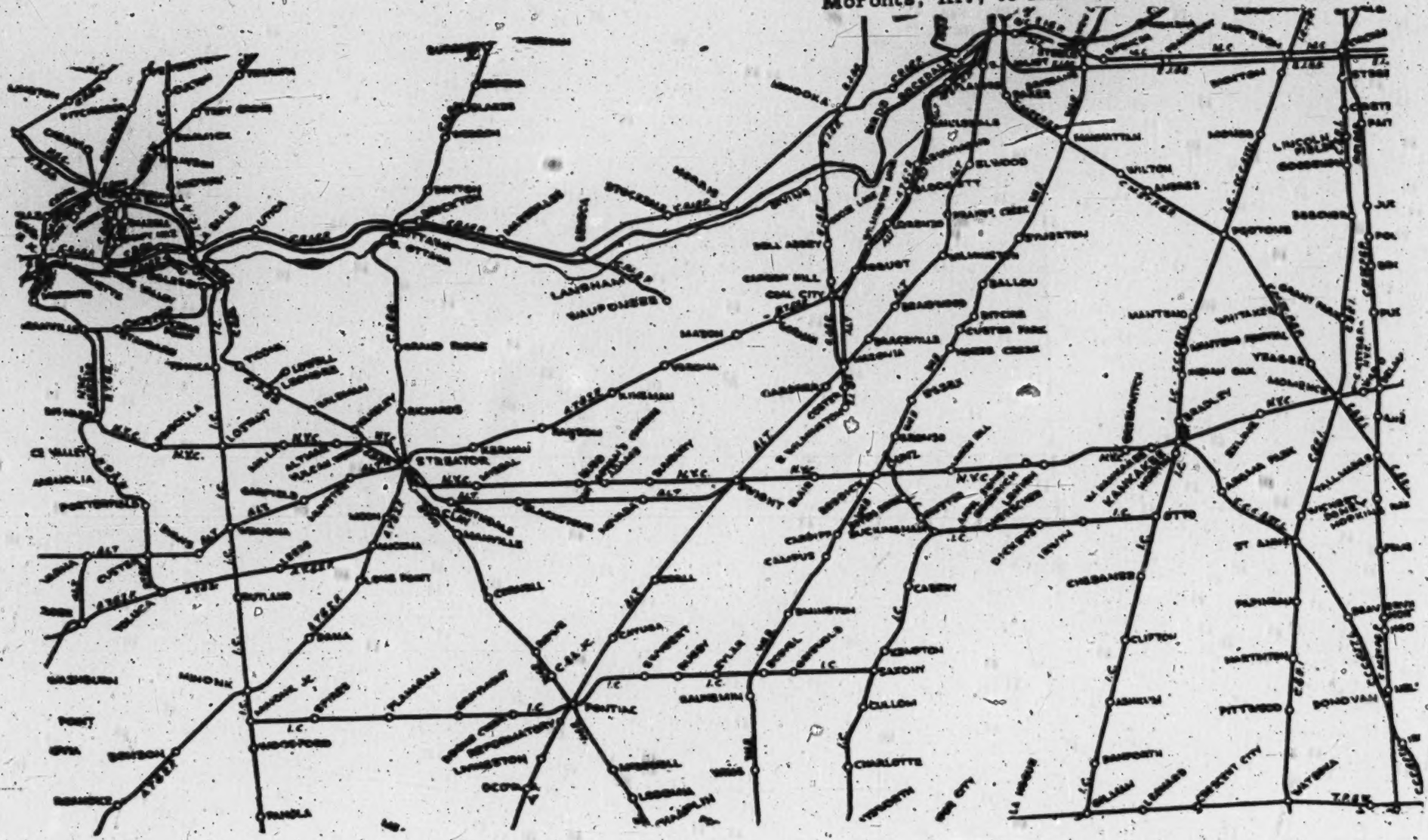
[fol. 287] Map "A"—Map of New York Central RR from Moronts, Ill. to Kankakee, Ill., and of the Illinois Waterways omitted from the record here. Printed at page 115.

[fol. 288]

MAP "B"

MAP "B"

Enlarged Map of New York Central from Moronts, Ill., to Kankakee, Ill.



[fol. 289]

ILLINOIS FREIGHT ASSOCIATION
APPLICATION I.R.C. D-503-195

Chicago, June 18, 1956

Org.
P.B. 923 Time expires 7-7-56

The following is listed for consideration at the next meeting of the Illinois Rate Committee.

R. G. Raasch, Chairman

Commodity:

Corn, carloads.

Minimum Weight:

100,000 pounds.

From:

West Kankakee, Union, Hill, Reddick, Blair, Dwight, Sunbury, Budd, Missal, Streator, Milla, Lostant, Priscilla, McNabb, Granville and Moronts, Illinois.

To:

Kankakee, Illinois

Present Rate:

Various.

Proposed Rate:

5¢ per cwt., including X-196 increase (See Notes A and B).

Note A—
Rates to be subject to milling in transit.

Note B—
Appropriate tariff amendments to provide for non-application of through rates from these stations where

combination rates are lower. (See Item 278-J of C.T.R. Tariff 245-H and Item 125, Supplement 11 of W.T.L. Tariff 68-B).

Routing:

NYC (W) Direct.

Fourth Section:

Fourth Section Relief to be obtained.

Effective Date:

Statutory notice.

Tariff Vehicle:

NYC tariff 701-A.

Justification:

The present rates are merely paper rates as there is no rail movement of Grain from these stations.

Local elevators on our line at these stations have capacity of 3000 to 5000 cars, yet the Corn handled through or via these elevator operations moves by truck to Illinois River Landings, then barge beyond.

Corn is bought on a price at Illinois River Landings and moved via barge to Chicago at rates ranging from 5¢ cwt. from Illinois River Landings Spring Valley and LaSalle, to 4¼¢ cwt. from Morris, Ill.

[fol. 290] Thus this proposal is merely to equalize via rail the rate presently in effect via barge and to permit of NYC handling Corn to Kankakee and the milled products in rail movement beyond Kankakee.

The milled products involved are: Corn Grits, Corn Meal, Corn Flour, Hominy Feed and Brewers Flakes.

No new transit is involved as these products are presently provided as outbound commodities under milling in transit arrangements.

We believe we should be permitted every opportunity to transport Corn from our own stations to Kankakee—for milling—insuring our handling products outbound on the same basis as available from these stations via truck-barge.

The reason for proposing the proposed rate subject to transit—a typical example would be on Corn—bid a certain price at Illinois River Landing (LaSalle, Ill.), is trucked from Morontc and moved via barge to Chicago at rate of 5¢ cwt.

At Chicago the Corn is milled and product reshipped to New York at reshipping rate of 49½¢ cwt., or through rate of 54½¢ cwt.

This compares with a through rate—Moronts to New York—of 72¢ cwt. which Kankakee miller would pay on Corn moving via rail; however, as previously stated, there is no rail movement of Corn from these Kankakee Belt Stations.

It is thus obvious all we are proposing is to permit of our handling Corn originating at our stations on the same basis as available via competing forms of transportation.

Of course, another way to accomplish this would be to provide for application of reshipping rates on ex-truck Corn, in the same manner as applicable on ex-barge Grain, as the Commission itself in "Grain Proportionals, Ex-Barge to Official Territory", Volume 248, Page 323, Commissioner Eastman stated:

> "Question has been as to whether the failure to apply reshipping rates to grain which has been trucked into Chicago results in violation of sections 2 and 3. This question is not here in issue. My tentative opinion upon it is that where the movement by truck is from territory from which grain can be moved by rail or by water to Chicago subject to the application of the reshipping rates east-bound, the failure to apply such rates to the grain brought in by truck does result in violation of sections 2 and 3, provided adequate provisions for the identification and policing of such shipments are practicable and enforceable."

Rather than here propose such a new precedent, we believe it to be more in the interest of the railroad industry to merely equalize the competitive situation by establishing via Kankakee the same transportation cost as available via competing form of transportation via Chicago.

We would thus be in position to transport the Corn into Kankakee at revenue per car $50.00, at car mile earnings ranging from 60¢ to $2.25, no switching absorptions involved and to also insure outbound movement of products via rail.

Origin of Proposal:

Carrier.

[fol. 291]

July 10, 1956

File: IRC Appln. 503-195
cc: 4502-27

Dear Sir:

Subject: Corn, CL, from West Kankakee, Union, Hill, Reddick, Blair, Dwight, Sunbary, Budd, Missal, Streator, Milla, Lostant, Priscilla, McNabb, Granville, and Moronts, Illinois to Kankakee, Ill.

Supplementing our letter of June 21, 1956, concerning IRC Application 503-195, suggesting a rate of 5 cents per 100 pounds on the above caption, which was listed for consideration at the July, Illinois Rate Committee meeting.

The Illinois Carriers on consideration did not recommend the proposal as docketed.

If there are any further developments, we will write you further.

Yours very truly,

Asst. Freight Traffic Manager

[fol. 292]

July 17, 1956

File: IRC Application 503-195
cc: 4502-27

Dear Sir:

Subject: Corn, C.L., from West Kankakee, Union, Hill, Reddick, Blair, Dwight, Sunbary, Budd, Missal, Streator, Milla, Lostant, Priscilla, McNabb, Granville and Moronts, Illinois to Kankakee, Illinois.

Supplementing our letter of July 10, 1956 relative to IRC Application 503-195 suggesting a rate of 5 cents per 100 pounds on the above caption, which was considered, but not recommended, at the July Illinois Rate Committee meeting.

The matter has been listed for review at the July meeting of the Illinois Freight Association Traffic Executive Committee under EC Docket 4826.

It will be our purpose to inform you of the future developments.

Yours very truly,

Asst. Freight Traffic Manager.

[fol. 293]

July 27, 1956

File: IRC Appln. 503-195
cc: 4502-27

Dear Sir:

Subject: Corn, C.L., from West Kankakee, Union, Hill, Reddick, Blair, Dwight, Sunbary, Budd, Missal, Streator, Milla, Lostant, Priscilla, McNabb, Granville, and Moronts, Illinois to Kankakee, Illinois.

Supplementing our letter of July 17, 1956, concerning IRC Application 503-195 suggesting a rate of 5 cents per 100 pounds on the above caption which was listed for review at

the July Illinois Freight Association Traffic Executive Committee Meeting under EC Docket 4826.

On consideration by the Traffic Executive Committee, the proposal as docketed was recommended.

Yours very truly,

Asst. Freight Traffic Manager

[fol. 294]

ILLINOIS FREIGHT ASSOCIATION

Chicago, August 7, 1956
Appln. IRC-K-503-195
E.C. Docket 4826

Determination Advice E. C. 596

Traffic Executive Committee
and Tariff Publishing Agents

Commodity:

Corn, carloads.

Minimum Weight:

100,000 pounds.

From:

West Kankakee, Union, Hill, Reddick, Blair, Dwight, Sunbury, Budd, Misal, Streator, Milla, Lostant, Priscilla, McNabb, Granville and Moronts, Illinois.

To:

Kankakee, Illinois.

Recommended Rate:

5¢ per cwt., including X-196 increase (See Notes A and B).

Note A—
Rates to be subject to milling in transit.

Note B—
Appropriate tariff amendments to provide for non-application of through rates from these stations where combination rates are lower. (See Item 278-J of C.T.R. Tariff 245-H and Item 125, Supplement 11 of W.T.L. Tariff 68-R.)

Routing:
NYC(W) Direct.

Fourth Section:
Fourth Section Relief to be obtained by NYC(C) RR.

Tariff Vehicle:
NYC tariff 701-A.

Effective date:
Statutory notice.

R. G. Raasch, Chairman.

[fol. 295]

WESTERN TRUNK LINE COMMITTEE
Union Station
Chicago 6

G. A. Moller
Chairman

August 23, 1956
EE Appl'n. 21-4388

Freight Traffic Officers,
Western Trunk Lines

Replies Due by
September 7, 1956

Gentlemen:

CORN, CARLOADS, FROM STATIONS IN ILLINOIS TO KANKAKEE, ILLINOIS

The following has been received from Chairman Raasch and is submitted for your consideration:

"There is attached hereto a copy of I.F.A. E.C. Docket 4826 concerning proposed rate on Corn from West Kankakee, Union, Hill, etc., to Kankakee, Illinois.

The proposal was considered at the July 1956 I.F.A. Traffic Executive Committee meeting and was recommended, the record of which is as promulgated in the attached Determination Advice E. C. 596 dated August 7th. You will note the proposal also contemplates appropriate tariff amendments to provide for non-application of through rate from these stations where combination rates are lower, which feature should receive consideration of your Committees."

Unless objections are recorded by September 7, 1956, you will be considered as concurring.

Yours truly,

G. A. Moller

cc: Mr. O. E. Schultz, Chrm. GFTC-E.RR New York, N.Y.
Mr. R. G. Raasch, " I.F.A., Chicago, Ill.
Mr. C. S. Baxter, " FTC-C.T.R., Chicago, Ill.
Mr. J. P. Harrington " FTC-N.E.T.R., Boston, Mass.

[fol. 296]

GENERAL FREIGHT TRAFFIC COMMITTEE—
EASTERN RAILROADS

One Park Avenue, New York 16, N. Y.

DETERMINATION ADVICE

The changes in rates, rules and regulations shown below are recommended.

When a carrier or carriers are specified herein this advice shall also embrace any other line or any joint route in which all of the carriers concur in the publication of a joint rate or arrangement.

When traffic matters covered by this determination advice involve tariffs issued by the Tariff Publishing Agents in Boston, Mass., New York, N. Y., and Chicago, Ill., they will also be understood to refer to all carriers interested in such tariffs unless the Tariff Publishing Agent in Boston, New York, or Chicago, as the case may be, is advised to the contrary within five (5) days from the date hereof.

Traffic matters covered hereby do not refer to Coal, Coke (the direct product of coal) or Iron Ore.

O. E. Schultz, Chairman.

October 31, 1956.
Determination Advice No. C-1301-383

Traffic Executive Association—
Eastern Railroads Meeting October 18, 1956 (Topic 19) and as Corrected by Errata issued October 29, 1956.
Submittal (8-22-56)

Establish a proportional rate of 5 cents per 100 pounds, on Corn and Corn Products, carloads, minimum weight 100,000 pounds,

From—

West Kankakee	Ill.	Misal	Ill.
Union	Ill.	Streator	Ill.
Hill	Ill.	Milla	Ill.
Reddick	Ill.	Losant	Ill.
Blair	Ill.	Priscilla	Ill.
Dwight	Ill.	McNabb	Ill.
Sunbury	Ill.	Granville	Ill.
Budd	Ill.	Moronts	Ill.

To—

Kankakee, Ill.

for application only on shipments destined to Western Termini of Eastern Trunk Lines and east thereof. Through rates to be non-applicable from these origins where lower.

Rate to be subject to milling in transit.

Route:

Via N.Y.C.(W) R.R. direct.

Issued to meet water and highway competition.

O. E. Schultz, Chairman.

nd

List 2—(G) 1 Folio NGDA—11752

[fol. 297]

October 31st, 1956
File: C1301-383

Memo for File:

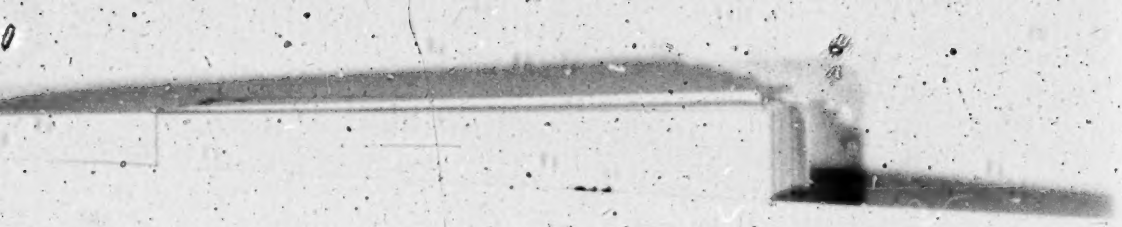
In conference with Mr. W. K. Ulrich, AFSM of the New York Central System, Chicago, Ill., relative to Topic 19 of the TEA Proceedings of October 18, 1956, which approved the publication of a rate of 5 cents per 100 pounds, including Ex Parte 196 increase on Corn and Corn Products, C. L., minimum weight 100,000 pounds to apply as a proportional rate, subject to milling in transit, from New York Central stations in Illinois located west of Kankakee to Kankakee, Ill., the question of seeking fourth section relief was discussed and considered.

In view of the type of publication that is here involved, it was determined that no fourth section relief was necessary at this time as the rates which are to be published would create no departures themselves from the origins involved to Kankakee. Furthermore, the proportional rate which will be used beyond Kankakee is amply protected by relief afforded under Fourth Section Order No. 18407. From past experiences it is known that no additional relief is necessary to observe combination rates or the aggregate of intermediaries even though they might produce lower charges in the aggregates then those produced by local rates applicable from higher rated intermediate points, provided of course, that each factor in the combination is properly protected. Therefore, as the rates in this instance would be protected individually under the fourth section of the act, it has been determined that no additional relief is necessary.

This situation was informally discussed with Mr. Robert Newell, Chairman of the Fourth Section Board, by telephone and he agreed that there will be no additional fourth section relief necessary at this time, in view of the fact that each factor of the combination is protected insofar as fourth section is concerned. We then suggested that the rate of 5 cents per 100 pounds, on the traffic involved be published to Kankakee as proposed by the New York Central without the filing of application for fourth section relief. Mr. Ulrich was satisfied with the conclusions reached, in this case and would progress the proposed publication in NYC and Agent Hinsch's tariffs in order that the rates might become effective at the earliest possible date. It was further decided that since no fourth section relief was required, at this time, that the covering determination advice would make no reference thereto and instructions were given to publish same accordingly.

H. W. Piekarski

P-ias
CC: Mr. W. K. Ulrich, AFSM, NYC RR, Chicago, Ill.



Subject (except as otherwise provided by "(S)" and "(S)") to TARIFF OF INCREASED RATES AND CHARGES X-178-G, Agent H. R. Hinsch's ICC 4679, CTC 2173, IIOC 582, PSC-NY 388, Ohio 2884, PaPUC 414, supplements thereto or successive issues thereof and subject to Increase in Rates and Charges, as provided in Item X-196 Series, page 2 of Supplement 108.

SUPPLEMENT
TO

C. T. C. 286	M. P. S. C. 224	I. C. C. 1169
Ill. C. C. 172	P. S. C.-N. Y. 541	Pa. P. U. C. 204
Ind. R. C. 213	Ohio 346	P. S. C.-W. Va. 135

THE NEW YORK CENTRAL RAILROAD COMPANY

IN CONNECTION WITH

PARTICIPATING CARRIERS SHOWN ON PAGES 3 TO 5 OF TARIFF, AS AMENDED

SUPPLEMENT 114

TO

FREIGHT TARIFF 701-A

Cancels Supplement 113

Supplements 86, 91, 109, 113 and 114 and the following Special Supplement contain all changes.
Supplement 80 (Ex Parte 175) (Blanket 229).

LOCAL, JOINT AND PROPORTIONAL FREIGHT TARIFF

NAMING RATES IN CENTS PER 100 POUNDS (EXCEPT AS NOTED)

ON

GRAIN AND GRAIN PRODUCTS

AND OTHER ARTICLES AS DESCRIBED ON PAGES 6 AND 8 OF TARIFF

ALSO

FEED OR FEED INGREDIENTS, ANIMAL OR POULTRY

AS DESCRIBED IN RULE 2, PAGE 35 OF TARIFF, AS AMENDED

IN CARLOADS (Except as Noted)

FROM STATIONS ON	TO STATIONS IN	
NEW YORK CENTRAL RAILROAD (Stations in United States, Buffalo, N. Y., Clearfield, Pa., and West) and other Initial Carriers shown on Page 3 of tariff	ILLINOIS INDIANA IOWA KENTUCKY MICHIGAN MISSOURI	NEW YORK OHIO PENNSYLVANIA WEST VIRGINIA WISCONSIN

ALSO MILEAGE RATES, SEE PAGES 561 AND 569 OF TARIFF

Governed, except as otherwise provided herein, by Official and Illinois Classification (OFC) and by exceptions in Agent H. R. Hinsch's Tariff 130 Series, Agent C. W. Boin's Tariff 90 Series, and Agent R. G. Raasch's Tariff 80 Series (see Rule 126 of tariff, as amended).

ISSUED NOVEMBER 13, 1956 — EFFECTIVE DECEMBER 15, 1956

Issued by
R. T. WAITZ,
Manager Tariff Bureau,
466 Lexington Avenue,
NEW YORK 17, N. Y.

(A—3109—2000—GHE) (Printed in U. S. A.) (SP 7920, 210-120; N4+1)

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[fol. 298]

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SECTION 2

EXPLANATION OF REFERENCE MARKS USED IN TARIFF

Page 37 of tariff. Change:

(91) Will not apply to Kankakee, Ill., on Soybeans on Illinois Intrastate Traffic, nor on Corn, as described on page 591 of tariff, as amended, naming five (5) cent rate to Kankakee, Ill., from origins named therein for interstate proportion application, as provided on page 591 of tariff, as amended.

EXPLANATION OF REFERENCE MARKS USED IN THIS SUPPLEMENT

♣Reduction.
†Applies only on Interstate Traffic.
✦Applies only on Intrastate Traffic.
@Applies only on Grain.
(90)Published to meet highway competition.
(107)Rates apply on Grain when shipments originate in Wisconsin, Iowa, Minnesota, Nebraska, North Dakota and South Dakota, or milled or malted in transit from Grain originating in said territory.
(110)Rate applies only from the tracks of the NYC(C) and does not include switching or river transfer charges to East St. Louis, Ill.
(112)Applies only on traffic originating beyond E. St. Louis, Ill., where no through rates are in effect to Cincinnati, Ohio, Jeffersonville, Ind., and Louisville, Ky., and destined to stations in Carolina, Green Line and Southeastern Territories, as per Agent H. R. Hinsch's Territorial Directory 3-J, ICC 4622; also Appalachia, Va., Mendota, Va., Speers Ferry, Va., Harlan, Ky., Lot, Ky., Hopkinsville, Ky., and Middlesboro, Ky., and points taking same rates, as per Agent C. A. Spaninger's Southern Group Basis Tariff 700-E, ICC 1516.

On traffic to other points in Kentucky, the following basis will apply:
Rates to Winfield, Tenn., as maxima to stations on the CNO&TP or Sou north of this point.
Rates to Nashville, Tenn., as maxima to stations on the IC, Hopkinsville, Ky., and intermediate points.
Rates to Nashville, Tenn., as maxima to stations on the L&N, intermediate to Clarksville, Tenn., and Nashville, Tenn.

Also applies on traffic originating at points west of the Mississippi River when for export through the Gulf Ports, viz.:

Chickasaw, Ala. (SouRy only)	**New Orleans, La., & Subports, viz.:**		**Panama City, Fla.**
	Algiers, La.	Harvey, La.	**Pascagoula, Miss.**
Garyville, La.	Avondale, La.	Marrero (Amesville), La.	**Pensacola, Fla.**
Gulfport, Miss.	Belle Chasse, La.	Port Chalmette, La.	**Theodore, Ala.**
Mobile, Ala.	Braithwaite, La.	Shrewsbury, La.	
Moss Point, Miss.	Gouldsboro, La.	Three Oaks, La.	
	Gretna, La.	Westwego, La.	

or Port Everglades, Fla., when forwarded via Cincinnati, Ohio, and Louisville, Ky.

(113)Applies only on traffic destined to points named in Agent C. A. Spaninger's Mississippi Valley Grain Tariff 133-L, ICC 1353.
(114)Applies only on traffic reshipped via NYC(C) to all points on the NYC(C) or its connections with accorded milling-in-transit privileges at Louisville, Ky.
(115)Applies only on traffic oribinating at East St. Louis, Ill., and is not applicable on traffic originating beyond.
(116)Route formerly provided and not brought forward is cancelled. Account shown in error.
(117)Not subject to Tariff of Increased Rates and Charges X-175-C and X-196-A, referred to on title page hereof.
(118)Rate applies only on Corn and Corn products, when milled-in-transit, and only as proportional rate to Kankakee, Ill., on traffic destined to the Western Termini of Eastern Trunk Lines and East thereof, as defined in Central Territory Railroads Tariff 3-I, Agent H. R. Hinsch's ICC 4176. Minimum weight 100,000 pounds. Rates are subject to transit rules and regulations published in tariffs lawfully on file with the Interstate Commerce Commission.
(119)Will also apply on shipments which arrive by river or canal at Chicago, Ill. Rate is applicable as of the date shipments leave the point of origin as shown on the shipping directions surrendered at Chicago, Ill.

□ (with number enclosed) **Reissued** from supplement bearing the number enclosed within the square. See Rule 190 of tariff, as amended.

EXPLANATION OF NOTES

(Applies only in connection with rates making specific reference thereto)

(110)**Note 14—Cancels Note 14, page 33 of tariff, as amended by page 5 of Sup. 91.** Expires with October 1, 1957, unless sooner cancelled, changed or extended. **(Corn,** page 590 of tariff.)

(111)**Note 15—Cancels Note 15, page 33 of tariff, as amended by page 5 of Sup. 91 and title page of Sup. 110. Effective** October 2, 1957, unless sooner cancelled, changed or postponed. **(Corn,** page 590 of tariff.)

SECTION 3

GRAIN AND GRAIN PRODUCTS, AS PER LISTS REFERRED TO IN RULE 1, PAGE 35 OF TARIFF

For Station FROM which rates apply, see Section 1 of tariff

FROM Station	Rates	Delivering Line	Route	FROM Station	Rates	Delivering Line	Route	FROM Station	Rates	Delivering Line	Route
To Springfield, Ill.											
NYC											
Page 466 of tariff, as amended by page 47 of Sup. 91 and page 6 of Sup. 109.											
(111)**Change:**											
6310	28	B&O GM&O IC IllT Wab	(84) 15, 18 41 51 35, 47								

For Explanation of Abbreviations and Notes, see Section 2 of tariff, as amended; Reference Marks, see page 2 of this supplement.

Underscoring ours.

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[fol. 299]

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SECTION 3

RESHIPPING RATES

GRAIN AND GRAIN PRODUCTS, AS PER LISTS REFERRED TO IN RULE 1, PAGE 36 OF TARIFF

For Station FROM which rates apply, see Section 1 of tariff

FROM Station	Rates	Delivering Line	Route	FROM Station	Rates	Delivering Line	Route	FROM Station	Rates	Delivering Line	Route
To Louisville, Ky.											
Page 551 of tariff, as amended by page 53 of Sup. 94. [111] Change: NYC											
15015	(21) (22) 10 (24) (25) 19 (27) 17	NYC(C)	113								

SECTION 4

GRAIN AND GRAIN PRODUCTS, AS PER LISTS REFERRED TO IN RULE 1, PAGE 36 OF TARIFF

For Station FROM which rates apply, see Section 1 of tariff

FROM Station	RATES Proper †	RATES Proper ◆	RATES Proportional †	RATES Proportional ◆	Delivering Line	Route	FROM Station	RATES Proper †	RATES Proper ◆	RATES Proportional †	RATES Proportional ◆	Delivering Line	Route
To Sheldon, Ill.													
NYC Page 577 of tariff, as amended by page 7 of Sup. 109. Change:													
15630			(d)14										
15635	@21	@19	(d)14 (e)16		NYC(C)	1							

CORN, AS PER GRAIN LIST IN SECTION 1 OF AGENT H. R. HINSCH'S FREIGHT TARIFF 600-H, I. C. C. 4644

FROM	TO	RATE	Delivering Line	Route
Page 591 of tariff. Add:				
Blair Ill.				
Budd Ill.	Kankakee Ill.	(22)(25)5	NYC(W)	1
Dwight Ill.				
Granville Ill.				
[111] Leesburg Ind.	Chicago Ill.	@16	NYC(W)	31
Lehigh Ill.				
Lostant Ill.	Kankakee Ill.	(22)(25)5	NYC(W)	1
McNabb Ill.				
Pages 591 of tariff and 58 of Sup. 91. Change:				
[111] Milford Ind.	Chicago Ill.	@16	NYC(W)	31
[111] Milford Junction Ind.				
Page 591 of tariff. Add:				
Mills Ill.				
Missal Ill.				
Moronts Ill.				
Priscilla Ill.				
Reddick Ill.	Kankakee Ill.	(22)(25)5	NYC(W)	1
Smith Spur Ill.				
Streator Ill.				
Sunbury Ill.				
Union Hill Ill.				
Van's Siding Ill.				
Pages 591 of tariff and 58 of Sup. 91. Change:				
[111] Warsaw Ind.	Chicago Ill.	@16	NYC(W)	31
Page 591 of tariff. Add:				
West Kankakee Ill.	Kankakee Ill.	(22)(25)5	NYC(W)	1

For Explanation of Abbreviations and Notes, see Section 2 of tariff, as amended; Reference Marks, see page 2 of this supplement.

SUPPLEMENT
TO

C. T. C. 2171
H. R. Hinsch, Agent

Mich. P. S. C. 771
H. R. Hinsch, Agent

I. C. C. 1499
H. R. Hinsch, Agent

Ind. R. C. D-863
H. R. Hinsch, Agent

I. C. C. A-3941
W. J. Prueter, Agent

CENTRAL TERRITORY RAILROADS
TARIFF BUREAU
(H. R. Hinsch, Agent)

SUPPLEMENT 38
TO
FREIGHT TARIFF 535-C
Cancels Supplement 37

Supplements 3, 26, 36 and 38 contain all changes.

PROPORTIONAL RATES
APPLYING ON
GRAIN AND GRAIN PRODUCTS
CARLOADS

FROM			TO Stations in	
CAIRO, ILL.	EAST ST. LOUIS, ILL.	MANITOWOC, WIS.	INDIANA	OHIO
CHICAGO, ILL.	GALE, ILL.	MENOMINEE, MICH.	KENTUCKY	PENNSYLVANIA
EAST JOLIET, ILL.	KANKAKEE, ILL.	MICHIGAN CITY, IND.	MICHIGAN	WEST VIRGINIA
EAST FT. MADISON, ILL.	KEWAUNEE, WIS.	MILWAUKEE, WIS.	NEW YORK	
EAST HANNIBAL, ILL.	MACKINAW CITY, MICH.	PEORIA, ILL.	named on pages 10 to 60 incl., of tariff, as amended	
EAST KEOKUK, ILL.	MANISTIQUE, MICH.	QUINCY, ILL.		
		ST. LOUIS, MO.		
		THEBES, ILL.		

and other points named on pages 8 to 9 incl., of tariff, as amended

Governed, except as otherwise provided herein, by Official Classification 65, I. C. C.-O. C. 65, Mich. P. S. C.-O. C. 65, W. S. Flint, Agent; by exceptions thereto, Tariff 130-C, I. C. C. 3026, Mich. P. S. C. 675, issued by H. R. Hinsch, Agent, and by supplements thereto or successive issues of said publications.

ISSUED NOVEMBER 7, 1956

EFFECTIVE DECEMBER 15, 1956

W. J. PRUETER, Agent,
816 W. Jackson Blvd.,
Chicago 6, Ill.

Issued by
H. R. HINSCH, Agent,
22 West Madison Street,
Chicago 2, Ill.

(Filed with ICC—CTC—Ind—Mich)

(2000) G.W.—20000

EXPLANATION OF NOTES

Note 45 Cancels Note 45 pages 2 and 3 of Supplement 37.

APPLICATION OF RESHIPPING OR PROPORTIONAL RATES APPLICABLE ON TRAFFIC ORIGINATING AT POINTS IN THE TERRITORY AS DESCRIBED BELOW

Where reference is made to this Note rates will apply as follows:

Rates subject to the provisions of this Note are reshipping or proportional rates applicable on traffic reaching the reshipping point via a rail or water transportation line that can furnish to the outbound carrier freight bill or like documentary evidence as to the origin of the traffic and rate paid to the reshipping point, and will only apply on such traffic when originating at points in the territory as described below, from which no single factor through commodity rates are in effect in connection with inbound carrier via the reshipping point from original shipping point to final destination, provided that in no case shall the combination through rate to and from the reshipping point be less than the sum of the rate from the reshipping point to final destination nor less than the through joint rate in effect on the commodity reforwarded from the reshipping point from origin points of the rate to final destination of the grain or grain products, whichever may be the higher. The differentials as provided herein or the above basis of rates are to be added to the reshipping or proportional rate from the reshipping point. (See Item [illegible].)

On shipments which arrive by River or Canal at Chicago, Pekin or Peoria, Ill. These rates are applicable as of the date shipments leave the point of origin as shown on the shipping directions surrendered at Chicago, Pekin or Peoria, Ill.

These rates are subject to transit rules and regulations published in tariffs on file with the Interstate Commerce Commission.

Rates also apply on through billed shipments originating at points in territory as described in this Note, not stopped in transit at reshipping points subject to this application.

Exception.—The foregoing provisions as to the application of local rates or the rate from the origin point to final destination as minima will not apply on shipments arriving at Chicago, Pekin or Peoria, Ill., by River or Canal, nor on shipments of corn or corn products as enumerated in B-6 arriving at Kankakee, Ill., by NYC from NYC Stations West Kankakee, Ill., to Moronts, Ill. (Station Numbers 8000 to 8239).

A-1. Rates on Grain from Chicago, Ill., East Joliet, Ill., Kankakee, Ill., Kewaunee, Wis., Manistique, Mich., Manitowoc, Wis., Menominee, Mich., and Milwaukee, Wis., and points taking same rates as shown on pages 6 to 9 incl., of tariff, as amended, subject to the provisions of this Note, apply on shipments of Grain when originating at points beyond. Will not apply on traffic originating in Trans-Mississippi River or Northwest Territories (for description, see Notes 20 and 40, pages 76 and 84 of tariff, as amended).

A-2. Rates on Grain Products from Chicago, Ill., East Joliet, Ill., Kankakee, Ill., Kewaunee, Wis., Manistique, Mich., Manitowoc, Wis., Menominee, Mich., Milwaukee, Wis., and points taking same rates as shown on pages 6 to 9 incl., of tariff, as amended, subject to the provisions of this Note, apply on shipments of Grain Products originating beyond. Will not apply on traffic originating in Trans-Mississippi River or Northwest Territories (for description, see Notes 20 and 40, pages 76 and 84 of tariff, as amended).

B-1. Rates on Grain from Peoria, Ill., and points taking same rates as shown on pages 6 to 9 incl., of tariff, as amended, (except as provided in paragraph B-2 hereof), subject to the provisions of this Note, apply on shipments of Grain when originating at points beyond. Will not apply on traffic originating in Trans-Mississippi or Northwest Territories (for description, see Notes 20 and 40, pages 76 and 84 of tariff, as amended).

B-2. Rates on Grain from Peoria, Ill., subject to the provisions of this Note will apply from Peoria, Bloomington, Crescent, Pekin, South Bartonville and Springfield, Ill., only as follows:

(a) As proportional or reshipping rates on shipments originating at stations shown in tariffs named in Note A page 87 of tariff, as amended, from which proportional rates are published to Peoria, Bloomington, Crescent, Pekin, South Bartonville or Springfield, Ill., and only when such proportional rates are assessed into Peoria, Bloomington, Crescent, Pekin, South Bartonville or Springfield, Ill., and when the grain is destined to the following points:

Bellaire	Ohio	Crabtree	Pa.	Irvineton	Pa.	Oil City	Pa.
Belle Vernon	Pa.	Dunkirk	N. Y.	Jacobs Creek	Pa.	Parkersburg	W. Va.
Bessemer	Pa.	East Buffalo	N. Y.	Johnstown	Pa.	Pittsburgh	Pa.
Black Rock	N. Y.	Elizabeth	Pa.	Lockrone	Pa.	Point Pleasant	W. Va.
Blairsville	Pa.	Ellwood City	Pa.	Masontown	Pa.	Ravenswood	W. Va.
Bridgeport	Ohio	Erie	Pa.	Maxwell	Pa.	Salamanca	N. Y.
Brownsville	Pa.	Fairchance	Pa.	Monongahela	Pa.	Suspension Bridge	N. Y.
Buffalo	N. Y.	Gauley Bridge	W. Va.	Moundsville	W. Va.	Titusville	Pa.
Charleston	W. Va.	Grafton	W. Va.	New Martinsville	W. Va.	Washington	Pa.
Connellsville	Pa.	Huntington	W. Va.	Niagara Falls	N. Y.	West Newton	Pa.
Corry	Pa.	Indiana	Pa.	North Tonawanda	N. Y.	Wheeling	W. Va.

and points named on pages 10 to 69 incl., of tariff, as amended, taking same rates or arbitraries higher.

(b) As proportional or reshipping rates on shipments originating at points beyond, except will not apply on traffic originating in Trans-Mississippi River Territory (see Note 20, page 76 of tariff), Northwest Territory (see Note 40, page 84 of tariff, as amended), or traffic covered by paragraph (a) Section B-2 of this Note.

(Concluded on following page)

For explanation of reference marks, see last page of this supplement.

Underscoring ours.

20080

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[fol. 302]

EXPLANATION OF NOTES

Note 45 Cancels Note 45 pages 2 and 3 of Supplement 37.—Concluded:

B-3. **Rates on Grain Products from Peoria, Ill., and points taking same rates as shown on pages 6 to 9 incl., of tariff, as amended,** subject to the provisions of this Note, apply on shipments of Grain Products (except on commodities bearing reference mark (e)), originating beyond, except will not apply on traffic originating in Trans-Mississippi River Territory (see Note 20, page 76 of tariff), Northwest Territory (see Note 40, page 84 of tariff, as amended), except as otherwise provided in paragraph B-5 below or on shipments subject to rates governed by the provisions of Note 50, page 88 of tariff; except that on shipments originating at stations shown in tariffs named in Note A, below, from which proportional rates are published to Peoria, Ill., and points taking same rates as shown on pages 6 to 9 incl., of tariff, as amended, and when the grain products are destined to the following points, rates on grain products subject to this Note, will only apply when the proportional rates published in tariffs named in Note A below, are assessed on the inbound shipments to Peoria, Ill., and points taking same rates as shown on pages 6 to 9 incl., of tariff, as amended.

Bellaire	Ohio	Crabtree	Pa.	Irvineton	Pa.	Oil City	Pa.
Belle Vernon	Pa.	Dunkirk	N. Y.	Jacobs Creek	Pa.	Parkersburg	W. Va.
Bessemer	Pa.	East Buffalo	N. Y.	Johnstown	Pa.	Pittsburgh	Pa.
Black Rock	N. Y.	Elisabeth	Pa.	Leckrone	Pa.	Point Pleasant	W. Va.
Blairsville	Pa.	Ellwood City	Pa.	Masontown	Pa.	Ravenswood	W. Va.
Bridgeport	Ohio	Erie	Pa.	Maxwell	Pa.	Salamanca	N. Y.
Brownsville	Pa.	Fairchance	Pa.	Monongahela	Pa.	Suspension Bridge	N. Y.
Buffalo	N. Y.	Gauley Bridge	W. Va.	Moundsville	W. Va.	Titusville	Pa.
Charleston	W. Va.	Grafton	W. Va.	New Martinsville	W. Va.	Washington	Pa.
Connellsville	Pa.	Huntington	W. Va.	Niagara Falls	N. Y.	West Newton	Pa.
Corry	Pa.	Indiana	Pa.	North Tonawanda	N. Y.	Wheeling	W. Va.

and points named on pages 10 to 69 incl., of tariff, as amended, taking same rates or arbitraries higher.

B-4. **Rates on Grain Products bearing reference mark (g) from Peoria, Ill., and points taking same rates as shown on pages 6 to 9 incl., of tariff, as amended,** subject to the provisions of this Note, apply on shipments originating beyond, except will not apply on traffic originating in Trans-Mississippi River Territory (see Note 20, page 76 of tariff), or Northwest Territory (see Note 40, page 84 of tariff, as amended), except as otherwise provided in paragraph B-5 below.

B-5. **Rates on Grain Products from Peoria, Ill., and points taking same rates as shown on pages 6 to 9 incl., of tariff, as amended,** subject to the provisions of this Note, apply on shipments originating at points in Northwest territory and destined to points in the States of Indiana, Michigan and Ohio bearing reference "①" on pages 142 to 147 of tariff, as amended, under heading Northwest (see Note 40, page 84 of tariff, as amended).

B-6. **Proportional rate from Kankakee will apply on corn and on the following products in carloads without regard to the existence of single factor joint through rates from NYC stations, West Kankakee, Ill., to Momence, Ill., maintaining and without observing such single factor through rates as minima. Combination rates using proportional or reshipping rate from Kankakee on corn and the following products are not subject to Kankakee local rate as minimum:**

Brewers' Flakes (not made from starch),
Brewers' Meal (not made from starch),
Corn Bran,
Corn Chop,
Corn Dust,
Corn Feed (ground, not the product of starch or glucose factories),
Corn Flour,
Corn Meal,
Corn Malt,
Corn Malt Sprouts,
Corn Oil Cake (ground or unground),
Corn Oil Meal,
Corn Screenings (whole or ground),
Corn Skimmings,
Cracked Corn,
Feed, animal or poultry, prepared,
Feed, corn cereal offal (not cereal food preparations and not for human consumption),
Feed, flaked corn, toasted or not toasted (not a cereal food preparation and not for human consumption),
Gluten Feed,
Gluten Feed, sweetened,
Gluten Meal
Grits (not made from starch),
Ground Corn,
Hominy,
Hominy Feed,
Hulled Corn,
Mash, spent grain, dried, without or with not exceeding one per cent (1%) of Vitamin A added.

NOTE A.

Issuing Line or Agent	Tariff	ICC	Item, Index or Reference
AT&SF	7124-K	14627	Items 315, 320, 325, 330, 335 and 340.
CB&Q	G. F. O. 1346-U	20241	Rates provided under column P.
C&IM	5-P	B-352	Page 13.
C&NW	G. F. D. 17042-D	11209	Rates under column B on pages 34 and 36.
CRI&P	34560-D	C-13411	Item 750.
GM&O	G. F. O. 3857-C	238	Item 350.
IC	1537-M	A-11897	Rates bearing reference 5 encircled on pages 40 to 72 incl.
IHT	480-G	A-15	Page 6.
M&StL	1590-J	29	Index Numbers 1155 to 1205 incl.
NYC	701-A	1169	
NYC&StL	G. F. D. 15-W	6117	Index Numbers 1090 to 1185.
PRR	73-E	3311	Item 405.
TP&W	155-A	312	
Wab	19308-E	7745	Items 3300, 3325.

For explanation of reference marks, see last page of this supplement

Underscoring ours. 29950

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SUPPLEMENT
TO

C. T. C. 2094
Ohio 2349

Pa. P. U. C. 361
P. S. C.-W. Va. 333

I. C. C. 4403

CENTRAL TERRITORY RAILROADS
TARIFF BUREAU

(H. R. Hinsch, Agent)

SUPPLEMENT 84

TO

FREIGHT TARIFF 245-H

Cancels Supplement 83

Supplements 82, 66, 75, 82 and 84 and the following special supplements contain all changes.
Supplements 76 and 77 contain only matter under suspension.
Supplement 76—Suspension Notice—I. & S. Docket 6615 (Equalization of Rates at North Atlantic Ports).

LOCAL, JOINT AND PROPORTIONAL RATES

ON

GRAIN AND GRAIN PRODUCTS

AND OTHER COMMODITIES
as named on page 9 of tariff

FOR LIST OF ARTICLES TAKING GRAIN AND GRAIN PRODUCTS RATES, MINIMUM WEIGHTS AND RULES APPLYING IN CONNECTION THEREWITH, REFER TO SECTION 1 OF FREIGHT TARIFF 600-H, I. C. C. 4044, C. T. C. 2263, OHIO 2511, PA. P. U. C. 408, P. S. C.-W. VA. 376, ISSUED BY H. R. HINSCH, AGENT

FROM Stations in		TO	
ILLINOIS	NEW YORK	ALBANY, N. Y.	PHILADELPHIA, PA.
INDIANA	OHIO	BALTIMORE, MD	ROCHESTER, N. Y.
IOWA	PENNSYLVANIA	BOSTON, MASS.	SYRACUSE, N. Y.
KENTUCKY	WEST VIRGINIA	NEW YORK, N. Y.	UTICA, N. Y.
MICHIGAN	WISCONSIN		
MISSOURI			
Named on pages 10 to 80 of tariff, as amended		And other Eastern points in the United States named on pages 87 to 99, 109 and 110 of tariff, as amended	

ALSO

BASIS FOR RATES TO UNITED STATES AND CANADIAN PORTS FOR EXPORT, AS PROVIDED IN SECTION 2 OF TARIFF, AS AMENDED

ALSO

Joint Rail-Motor Rates

TO

Points served by the Boston & Maine Transportation Company

Governed, except as otherwise provided herein, by Official Classification I. C. C.-O. C. 65, C. T. C.-O. C. 65, Ohio-O. C. 65, Pa. P. U. C.-O. C. 65, P. S. C.-W. Va.-O. C. 65, W. S. Flint, Agent, and by exceptions thereto, as indicated in Item 345 of tariff.

ISSUED NOVEMBER 7, 1956

EFFECTIVE DECEMBER 15, 1956

Issued by
H. R. HINSCH, Agent
22 W. Madison St.,
Chicago 2, Ill.

Filed with ICC-CTC-Ohio-Pa-W.Va.

(4300) (K-30539)

[fol. 304]

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AMEND Alphabetical List of Destination Stations, shown on pages 80 to 98 of tariff, by the addition of the following:

ALPHABETICAL LIST OF DESTINATION STATIONS SPECIFICALLY NAMED IN THIS TARIFF

Station	STATION	Carrier	Pages	Station	STATION	Carrier	Pages
320	Denton.....Md.	B&E....	158	175	Preston.....Md.	B&E....	158
125	Hebron.....Md.	B&E....	158	285	Queenstown.....Md.	B&E....	158
230	McDaniel.....Md.	B&E....	158	135	Vienna.....Md.	B&E....	158
5	Ocean City.....Md.	B&E....	158				

EXPLANATION OF NOTES

Note 20 cancels Note 20, page 16 of Supplement 52.

APPLICATION OF RE-SHIPPING OR PROPORTIONAL RATES FROM CHICAGO, JOLIET, KANKAKEE, MILWAUKEE, MANITOWOC, ETC.

(a) Where reference is made to this Note, rates apply as re-shipping or proportional rates applicable on traffic reaching the re-shipping point via a rail or water transportation line that can furnish to the outbound carrier freight bill or like documentary evidence as to the origin of the traffic and rate paid to the re-shipping point. Rates also apply on through billed shipments not stopped in transit at re-shipping points subject to this application.

(b) Provided, that in no case shall the combination through rate to and from the re-shipping point via rail be less than the rate from the re-shipping point applicable on a shipment originating thereat to final destination, the difference necessary to protect such rate from the re-shipping point to be added to the re-shipping rate therefrom. (See Exception below.)

(c) In no case shall the combination through rate to and from the re-shipping point via rail be less than the single factor through commodity rate from original shipping point to final destination named herein, which shall be the minimum through rate, the difference necessary to protect such minimum through rate shall be added to the reshipping rate from the reshipping point. The provisions of Paragraph (c) will not apply in connection with application of Items 278 and 279 of tariff, as amended.

These rates are applicable on Ex-Lake shipments as of the date such shipments leave the lake port.

These rates are applicable on shipments which arrive at Chicago, Ill., by River or Canal. The rates covered hereby are applicable as of the date from point of origin as shown on the shipping directions surrendered at Chicago, Ill.

The Ex-Lake Grain and (or) Grain Product rates will apply only on Grain and (or) Grain Products which arrive at Chicago, Milwaukee or Manitowoc via lake, also on Grain Products milled from Grain which arrives at these ports via lake. The Ex-Lake rates covered hereby are applicable as of the date shipments leave the respective points named herein.

The Ex-River or Ex-Canal Grain and (or) Grain Products rates will apply only on Grain and (or) Grain Products which arrive at Chicago, Ill., via river or canal, also on Grain Products milled from Grain which arrive at Chicago, Ill., via river or canal. The rates covered hereby are applicable as of the date from point of origin as shown on the shipping directions surrendered at Chicago, Ill.

These rates are subject to transit rules and regulations published in tariffs lawfully on file with the Interstate Commerce Commission.

Exception.—The provisions of paragraph (b) as to the application of the rate on shipments originating at the re-shipping point as minima will not apply in connection with shipments moving to Chicago, Ill., via River or Canal, nor on shipments of Malt and Malt Sprouts, C. L., originating at Jefferson Junction, Wis., nor on shipments of Corn and Corn Products, C. L., named in Item 279 of tariff, as amended, originating at NYC stations named in Item 279 of tariff, as amended. (D/A C1301-383.)

GENERAL EXCEPTIONS TO APPLICATION OF RATES

Item 279 (New).

EXCEPTION TO APPLICATION OF RATES ON CORN AND PRODUCTS THEREOF

Rates named in tariff, as amended, on Grain and Grain Products from:

Station Number	STATION	Station Number	STATION	Station Number	STATION	Station Number	STATION
	NYC(W)						
8090	West Kankakee...Ill.						
to	to						
8220	Moronts.....Ill.						

will NOT apply on carload shipments of Corn and the following products produced from Corn:

Brewers' Flakes (not made from starch),
Brewers' Meal (not made from starch),
Corn Bran,
Corn Chop,
Corn Dust,
Corn Feed (ground, not the product of starch or glucose factories),
Corn Flour,
Corn Meal,
Corn Malt,
Corn Malt Sprouts,
Corn Oil Cake (ground or unground),
Corn Oil Meal,
Corn Screenings (whole or ground),
Corn Skimmings,
Cracked Corn,
Feed, animal or poultry, prepared,
Feed, corn cereal offal (not cereal food preparations and not for human consumption),
Feed, flaked corn, toasted or not toasted (not a cereal food preparation and not for human consumption),
Gluten Feed,
Gluten Feed, sweetened,
Gluten Meal,
Grits (not made from starch),
Ground Corn,
Hominy,
Hominy Feed,
Hulled Corn,
Mash, spent grain, dried, without or with not exceeding one per cent (1%) of Vitamin A added.

when routed via Kankakee, Ill. and milled in transit. Combination rates will apply. (D/A C1301-383.)

For explanation of reference marks, see last page of this supplement.

Underscoring ours.

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Subject (except as otherwise provided by "GRIP" and "GRIP") to TARIFF OF INCREASED RATES AND CHARGES X-175-C, Agent M.R. Hinsch's ICC 4679, CTC 2273, IllCC 662, PSC-NY 358, Ohio 2854, PaPUC 816, supplements thereto or successive, issues thereof and subject to increase in Rates and Charges, as provided in Item X-196 Series, page 2 of Supplement 118, and subject to increase in Rates and Charges, as provided in Item X-206 Series, page 2 hereof.

SUPPLEMENT

TO

CTC 286	MPSC 224	ICC 1169
IllCC 172	PSC-NY 541	PaPUC 204
IndRC 213	Ohio 346	PSC-WVa 135

NEW YORK Central

THE NEW YORK CENTRAL RAILROAD COMPANY

IN CONNECTION WITH

PARTICIPATING CARRIERS SHOWN ON PAGES 3 TO 5 OF TARIFF, AS AMENDED

SUPPLEMENT 120

TO

FREIGHT TARIFF 701-A

Supplements 26, 91, 113, 119 and 120 and the following Special Supplement contain all changes.
Supplement 20 (ex Parte 175) (Blanket 229).

Local, Joint and Proportional Freight Tariff

NAMING RATES IN CENTS PER 100 POUNDS (EXCEPT AS NOTED)

ON

GRAIN AND GRAIN PRODUCTS

AND OTHER ARTICLES AS DESCRIBED ON PAGES 5 AND 6 OF TARIFF

ALSO

FEED OR FEED INGREDIENTS, ANIMAL OR POULTRY

AS DESCRIBED IN RULE 2, PAGE 35 OF TARIFF, AS AMENDED

IN CARLOADS (Except as Noted)

FROM STATIONS ON	TO STATIONS IN		
NEW YORK CENTRAL RAILROAD (Stations in United States, Buffalo, N.Y., Clearfield, Pa., and West) And other Initial Carriers shown on Page 3 of tariff.	ILLINOIS INDIANA IOWA KENTUCKY	MICHIGAN MISSOURI NEW YORK	OHIO PENNSYLVANIA WEST VIRGINIA WISCONSIN

ALSO MILEAGE RATES, SEE PAGES 551 AND 599 OF TARIFF

Governed, except as otherwise provided herein, by Official and Illinois Classification (CFC) and by exceptions in Agent M.R. Hinsch's Tariff 130 Series, Agent C.W. Boin's Tariff 80 Series, and Agent R. G. Raasch's Tariff 80 Series, (see Rule 125 of tariff, as amended)

ISSUED FEBRUARY 19, 1957 EFFECTIVE MARCH 24, 1957

Issued by

R. T. WAITE,

Manager Tariff Bureau

466 Lexington Avenue

NEW YORK 17, N. Y.

[fol. 306]

(MV-922-2-2000-GIR-MK) (Printed in USA) (V315-171; M4 ◆ 1)

Item X-206-Cancels Item X-206, page 2 of Supplement 119.

Except as otherwise provided in connection with particular rates and charges and except as otherwise provided below, rates and charges in this tariff, and in supplements thereto, are subject to Tariff of Increased Rates and Charges X-206 Agent H.R. Hinsch's ICC 4757, IllCC 677, PSC-NY 577, Ohio 2586, CTC 2317, supplements thereto or successive issues thereof.

EXCEPTIONS

The provisions of this item will NOT apply.

(a) On intrastate traffic moving between points, in, and transported wholly within, any state nor to rates or charges on intrastate traffic; nor

(b) On interstate traffic via an interstate route on a given interstate shipment moving between points in the States of ILLINOIS and INDIANA, between which points there is an intrastate rate of the same amount applicable on a like shipment via any route wholly within the same state in any tariff on file with the Interstate Commerce Commission nor to rates or charges applicable in connection with said Interstate shipment.

until authorized by letter-number supplements to Tariff of Increased Rates and Charges X-206, referred to above, which shall specify the increase applicable to such rates and charges, and which shall be filed with the Interstate Commerce Commission and State Commissions.

The form of this publication is permitted by authority of Interstate Commerce Commission, Permission 71234 of December 17, 1956.

EXPLANATION OF REFERENCE MARKS

Reference Mark		EXPLANATION
♦ END	B C	Increase. Rate applies only on Corn and Corn products, when milled-in-transit, and only as proportional rate to Kankakee, Ill., on traffic destined to the Western Termini of Eastern Trunk Lines and East thereof, as defined in Central Territory Railroads Tariff 8-J, Agent H.R. Hinsch's ICC 4622. Minimum weight 100,000 pounds. ♦ Rate will not apply when movement beyond Kankakee Ill. is routed via Chicago, Ill. and stations in the Chicago Switching District defined in Agent R.G. Raasch's Freight Tariff 20-Y, ICC 705, IllCC 380. Rates are subject to transit rules and regulations published in tariffs lawfully on file with the Interstate Commerce Commission.
XID	C	Will not apply from or to intermediate points. Departure from the terms of the amended Fourth Section of the Interstate Commerce Act is permitted by authority of the Interstate Commerce Commission 202nd Supplemental Fourth Section Order 17200 of January 30, 1957.

B-Brought forward without change.
C-Change. Cancels prior explanation of this reference mark in tariff, as amended.

(THE END)

For Explanation of Abbreviations and Notes, see Section 2 of tariff, as amended; Reference Marks, see above

Underscoring ours.

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Subject (except as otherwise provided by "CFD" and "CFF") to TARIFF OF INCREASED RATES AND CHARGES X-175-C, Agent H.R. Hinsch's, ICC 4679, CTC 2273, IllCC 662, PSC-NY 358, Ohio 2534, PaPUC 414, supplements thereto or successive issues thereof and subject to increase in Rates and Charges, as provided in Item X-196 Series, page 2 of Supplement 119, and subject to increase in Rates and Charges, as provided in Item X-208 Series, page 2 hereof.

SUPPLEMENT

TO

CTC 286	MPSC 224	ICC 1169
IllCC 172	PSC-NY 541	PaPUC 204
IndRC 213	Ohio 346	PSC-WVa 135

THE NEW YORK CENTRAL RAILROAD COMPANY

IN CONNECTION WITH

PARTICIPATING CARRIERS SHOWN ON PAGES 3 TO 5 OF TARIFF, AS AMENDED

SUPPLEMENT 121

TO

FREIGHT TARIFF 701-A

Cancels Supplement 120

Supplements 28, 91, 115, 119 and 121 and the following Special Supplement contain all changes.
Supplement 20 (Ex Parte 175)(Blanket 229).

Local, Joint and Proportional Freight Tariff

NAMING RATES IN CENTS PER 100 POUNDS (EXCEPT AS NOTED)

ON

GRAIN AND GRAIN PRODUCTS

AND OTHER ARTICLES AS DESCRIBED ON PAGES 5 AND 6 OF TARIFF

ALSO

FEED OR FEED INGREDIENTS, ANIMAL OR POULTRY
AS DESCRIBED IN RULE 2, PAGE 35 OF TARIFF, AS AMENDED
IN CARLOADS (Except as Noted)

FROM STATIONS ON	TO STATIONS IN		
NEW YORK CENTRAL RAILROAD (Stations in United States, Buffalo, N.Y., Clearfield, Pa., and West) And other Initial Carriers shown on Page 3 of tariff	ILLINOIS INDIANA IOWA KENTUCKY	MICHIGAN MISSOURI NEW YORK	OHIO PENNSYLVANIA WEST VIRGINIA WISCONSIN

ALSO MILEAGE RATES, SEE PAGES 551 AND 599 OF TARIFF

Governed, except as otherwise provided herein, by Official and Illinois Classification (CFC) and by exceptions in Agent H.R. Hinsch's Tariff 130 Series, Agent C.W. Rohn's Tariff 90 Series, and Agent R.G. Raasch's Tariff 80 Series. (see Rule 125 of tariff, as amended)

ISSUED MARCH 11, 1957

EFFECTIVE APRIL 13, 1957
(Except as otherwise provided herein)

Issued by
R.T. WAITE,
Manager Tariff Bureau,
466 Lexington Avenue,
NEW YORK 17, N. Y.

(MV971-2-2000-GJB-MA) (Printed in USA) (V315-171; N4 + 1)

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(NEW) Item X-206-Cancels Item X-206, page 2 of Supplement 119.

Except as otherwise provided in connection with particular rates and charges and except as otherwise provided below, rates and charges in this tariff, and in supplements thereto, are subject to Tariff of Increased Rates and Charges X-206, Agent H.R. Minsch's ICC 4787, IllCC 677, PSC-NY 377, Ohio 2568, CTC 2317, supplements thereto or successive issues thereof.

EXCEPTIONS

The provisions of this item will NOT apply:

(a) On intrastate traffic moving between points, in, and transported wholly within, any state, nor to rates or charges on intrastate traffic; nor

(b) On interstate traffic via an interstate route on a given interstate shipment moving between points in the States of ILLINOIS and INDIANA, between which points there is an intrastate rate of the same amount applicable on a like shipment via any route wholly within the same state in any tariff on file with the Interstate Commerce Commission nor to rates or charges applicable in connection with said interstate shipment.

until authorized by letter-number supplements to Tariff of Increased Rates and Charges X-206, referred to above, which shall specify the increase applicable to such rates and charges, and which shall be filed with the Interstate Commerce Commission and State Commissions.

The form of this publication is permitted by authority of Interstate Commerce Commission Permission 71234 of December 17, 1956.

EXPLANATION OF REFERENCE MARKS

Reference Marks		EXPLANATION
(A)	A	Effective March 24, 1957. Authority to publish upon ten (10) days' notice granted by permission of the Interstate Commerce Commission 72030 of March 7, 1957.
(NEW)	C	Rate applies only on Corn and Corn products, when milled-in-transit, and only as proportional rate to Kankakee, Ill., on traffic destined to the Western Termini of Eastern Trunk Lines and East thereof, as defined in Central Territory Railroads Tariff 3-J, Agent H.R. Minsch's ICC 4622. Minimum weight 100,000 pounds. Rates are subject to transit rules and regulations published in tariffs lawfully on file with the Interstate Commerce Commission.
(NEW)	C	Will not apply from or to intermediate points. Departure from the terms of the amended Fourth Section of the Interstate Commerce Act is permitted by authority of the Interstate Commerce Commission 202nd Supplemental Fourth Section Order 17200 of January 30, 1957.
□ (with number enclosed)	B	REISSUED from supplement bearing the number enclosed within the square. See Rule 190.

A-Addition.
B-Brought forward without change.
C-Change. Cancels prior explanation of this reference mark in tariff, as amended.

(THE END)

For Explanation of Abbreviations and Notes, see Section 2 of tariff, as amended; Reference Marks, see above.

GENERAL FREIGHT TRAFFIC COMMITTEE — EASTERN RAILROADS

ONE PARK AVENUE, NEW YORK 16, N. Y.

DETERMINATION ADVICE

The changes in rates, rules and regulations shown below are recommended.

When a carrier or carriers are specified herein this advice shall also embrace any other line or any joint route in which all of the carriers concur in the publication of a joint rate or arrangement.

When traffic matters covered by this determination advice involve tariffs issued by the Tariff Publishing Agents in Boston, Mass., New York, N. Y., and Chicago, Ill., they will also be understood to refer to all carriers interested in such tariffs unless the Tariff Publishing Agent in Boston, New York, or Chicago, as the case may be, is advised to the contrary within five (5) days from the date hereof.

Traffic matters covered hereby do not refer to Coal, Coke (the direct product of coal) or Iron Ore.

O. E. SCHULTZ, Chairman.

May 31, 1957.

Date:
SUPPLEMENT NO. 1 TO
DETERMINATION ADVICE NO. C1301-383

TRAFFIC EXECUTIVE ASSOCIATION-EASTERN RAILROADS,
Meeting at Chicago, Ill., May 23, 1957.

Establish proportional rate of 5 cents per 100 lbs., on Corn and Corn Products, carloads, minimum weight 100,000 lbs. -

From:	West Kankakee	Ill.	Misal	Ill.
	Union	Ill.	Streator	Ill.
	Hill	Ill.	Milla	Ill.
	Reddick	Ill.	Losant	Ill.
	Blair	Ill.	Priscilla	Ill.
	Dwight	Ill.	McNabb	Ill.
	Sunbury	Ill.	Granville	Ill.
	Budd	Ill.	Moronts	Ill.

To: Kankakee Ill.

Subject to Ex Parte 206 increases.

for application on shipments destined to Central territory.

Subject to following conditions:

1 - Procurement of origin Fourth Section relief.

2 - Through rates from these stations to be non-applicable where combination rates are lower.

3 - Local rate in NYC RR Tariff No. 701 on Corn Grits from Kankakee, Ill., to Battle Creek, Mich., to be made non-applicable in connection with approved proportional rates.

4 - Approved proportional rate to be subject to milling in transit.

5 - Issued to meet water and highway competition.

O.E. SCHULTZ,
Chairman.

Copies - Messrs:
H.R. Hinsch
H.W. Piekarski

ps
List No. 2 (G) - 1

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Subject (except as otherwise provided by "CTP") to TARIFF OF INCREASED RATES AND CHARGES X-175-C, Agent N.R. Hinsch's ICC 4673, CTC 2273, IllCC 662, PSC-NY 358, Ohio 2534, PaPUC 818, supplements thereto or successive issues thereof and subject to increase in Rates and Charges, as provided in Item X-196 Series, page 2 of Supplement 122 and subject to increase in Rates and Charges, as provided in Item X-206, page 2 of Supplement 122.

SUPPLEMENT

TO

CTC 286	MPSC 224	ICC 1169
IllCC 172	PSC-NY 541	PaPUC 204
IndRC 213	Ohio 346	PSC-WVa 135

NEW YORK Central

THE NEW YORK CENTRAL RAILROAD COMPANY

IN CONNECTION WITH
PARTICIPATING CARRIERS SHOWN ON PAGES 3 TO 5 OF TARIFF, AS AMENDED

SUPPLEMENT 126

TO

FREIGHT TARIFF 701-A

Supplements 26, 91, 122, 125, 126 and the following Special Supplement contain all changes Supplement 20 (Ex Parte 175)(Blanket 229).

Local, Joint and Proportional Freight Tariff

NAMING RATES IN CENTS PER 100 POUNDS (EXCEPT AS NOTED)

ON

GRAIN AND GRAIN PRODUCTS

AND OTHER ARTICLES AS DESCRIBED ON PAGES 5 AND 6 OF TARIFF

ALSO

Feed or Feed Ingredients, Animal or Poultry

AS DESCRIBED IN RULE 2, PAGE 35 OF TARIFF, AS AMENDED
IN CARLOADS (Except as Noted)

FROM STATIONS ON	TO STATIONS IN		
NEW YORK CENTRAL RAILROAD (Stations in United States, Buffalo, N.Y., Clearfield, Pa., and West) And other Initial Carriers shown on page 3 of tariff.	ILLINOIS INDIANA IOWA KENTUCKY	MICHIGAN MISSOURI NEW YORK	OHIO PENNSYLVANIA WEST VIRGINIA WISCONSIN

ALSO MILEAGE RATES, SEE PAGES 551 AND 599 OF TARIFF

Governed, except as otherwise provided herein, by Official and Illinois Classification (CFC) and by Exceptions in Agent N.R. Hinsch's Tariff 130 Series, Agent C.W. Boin's Tariff 90 Series and Agent R.G. Raasch's Tariff 80 Series (see Rule 125 of tariff, as amended).

This supplement contains Rates and Routes, subject to Reference Mark (1) that contravene the long-and-short-haul provisions of the Amended Fourth Section of the Interstate Commerce Act. Relief as to such departure is sought under Agent O.E. Schultz's Fourth Section Application 2386 of June 28, 1957.

ISSUED JUNE 28, 1957

EFFECTIVE JULY 30, 1957

Issued by
R.T. WAITE,
Manager Tariff Bureau,
466 Lexington Avenue,
NEW YORK 17, N. Y.

(MV1245-2-1900-CHE-MA) (Printed in USA) (315-168; M4 + 1)

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SECTION 3

GRAIN AND GRAIN PRODUCTS: AS PER LISTS REFERRED TO IN RULE 1, PAGE 35 OF TARIFF
For Station FROM which rates apply, see Section 1 of tariff

FROM Station	Rate	Delivering Line	Route	FROM Station	Rate	Delivering Line	Route	FROM Station	Rate	Delivering Line	Route
TO BATTLE CREEK, MICH.											
Page 70 of tariff. ▲ Change: NYC 8060	(A) 11	NYC(M) ...y.	1								

SECTION 4

CORN, AS PER GRAIN LIST IN SECTION 1 OF AGENT H.R. HINSCH'S FREIGHT TARIFF 600-H, ICC 4644

FROM	TO	RATE	Delivering Line	Route
Page 591 of tariff and 40 of Sup. 122. ▲ Change:				
Blair.....Ill. Budd.....Ill. Dwight.....Ill. Granville.....Ill. Lehigh.....Ill. Lostant.....Ill. McNabb.....Ill. Milla.....Ill. Missal.....Ill. Moronta.....Ill. Priscilla.....Ill. Reddick.....Ill. Smith Spur.....Ill. Streator.....Ill. Sunbury.....Ill. Union Hill.....Ill. Van's Siding.....Ill.	Kankakee.....Ill.	(C) (A) (A) (A) 5	NYC(W)	1

EXPLANATION OF REFERENCE MARKS

Reference Mark		EXPLANATION
▲	B	Reduction.
▲	B	Change in wording which results in neither increases nor reductions in charges.
(A)	B	Not subject to Tariffs of Increased Rates and Charges I-175-C and I-196-A, referred to on title page hereof.
(C)	C	Rate applies only on Corn and Corn Products, when milled-in-transit, and only as proportional rate to Kankakee, Ill., on traffic destined to Central Territory, and to the Western Termini of Eastern Trunk Lines and East thereof, as defined in Central Territory Railroads Tariff 3-J, Agent H.R. Hinsch's ICC 4622. Minimum weight 100,000 pounds. Rates are subject to Transit rules and regulations published in tariffs lawfully on file with the Interstate Commerce Commission.
(A)	A	Applies only on Grits, Corn (other than bakers', brewers', hominy or groats, also will not apply on Grits, flaked, granulated or refined), in bulk, carloads, minimum weight 100,000 pounds, except when car is loaded to full carrying capacity, actual weight will apply and only when routed via NYC(W) through Schneider, Ind., North Judson, Ind., to South Bend, Ind., thence NYC(M). Also will not apply in connection with the proportional rates named from stations Van's Siding, Ill.(Index 8100), to Moronta, Ill. (Index 8280), inclusive to Kankakee, Ill. on page 591 of tariff, as amended.
(A)	A	Will not apply from or to intermediate points, see Title Page. Departure from the terms of the amended Fourth Section of the Interstate Commerce Act, is sought under Agent O. E. Schult's Fourth Section Application 2866 of June 28, 1957.
(D)	B	Issued to meet motor truck and water competition.

A-Addition.
B-Brought forward without change.
C-Changes prior explanation of this reference mark in tariff, as amended.

(THE END)

For Explanation of Abbreviations and Notes, see Section 2 of tariff, as amended; Reference Marks, see above.

Underscoring ours. 312

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Subject to TARIFF OF INCREASED RATES AND CHARGES X-206, Agent H. R. Hinsch's ICC 4787, CTC 2317, PSC-NY 377, supplements thereto or successive issues thereof.

PSC-NY 823	CTC 463	ICC 1798
Cancels PSC-NY 652	Cancels CTC 380	Cancels ICC 1434

THE NEW YORK CENTRAL RAILROAD COMPANY

FREIGHT TARIFF 10705-E

CANCELS FREIGHT TARIFF 10705-D

LOCAL FREIGHT TARIFF

RULES AND CHARGES GOVERNING
TRANSIT PRIVILEGES

ON

GRAIN, GRAIN PRODUCTS

AND

OTHER COMMODITIES

IN CARLOADS

AT

BUFFALO, N. Y.
BLACK ROCK (BUFFALO), N. Y.
SUSPENSION BRIDGE, N. Y.

This tariff also applies on Intrastate Traffic

TRANSIT—GRAIN

ISSUED FEBRUARY 5, 1957 EFFECTIVE MARCH 15, 1957

Issued by
R. T. WAITE,
Manager Tariff Bureau,
466 Lexington Avenue,
NEW YORK 17, N. Y.

(A)-3295—800—WS) (Printed in U. S. A.) (V8; N1)

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RULES AND OTHER GOVERNING PROVISIONS

Item	SUBJECT	RULE
610	**Cancellation of Tonnage**	To the end that there shall not be in the possession of the transit house uncancelled inbound freight bills or inbound tonnage credits, that do not represent Grain, Grain Products and other commodities actually on hand, millers and maltsters must surrender for cancellation to the Eastern Weighing and Inspection Bureau: 1. With the submission of outbound shipping directions, sufficient representative freight bills of this Company to cover products forwarded by rail (transit). (See Items 810 and 820) 2. Daily, sufficient representative freight bills of this Company, or local tonnage credits, to cover Grain, Grain Products and other commodities disposed of locally or forwarded by rail (non-transit). 3. Daily, sufficient representative freight bills of this Company, and local tonnage credits, to cover invisible loss.
620	**Excess Inbound Weight**	Subject to Items 610 and 800, any excess weight shown on the inbound freight bills over the weight reshipped shall stand credited and may be applied in accordance with these rules, against subsequent shipments.
630	**Rates to Apply**	(a) The through rates to be applied from point of origin to final destination will be the lawfully published rate in effect via the transit point at the time of initial shipment of the commodity covered by the inbound billing matched against the outbound shipment (see Items 760, 770, 810 and 820), except that where the commodity covered by the inbound billing matched against the outbound shipment consists of Grain, Grain Screenings or Soybeans, the through rate to be applied on the outbound shipment will be that applicable to Grain Products in effect at the time the Grain, Grain Screenings or Soybeans originated. (See Items 640 and 650) (b) When the inbound commodity originates at a point from which there is applicable via the transit point no joint through rate on the inbound commodity to the final destination of the outbound commodity but from which a combination through rate applicable via the transit point can be constructed on a basing point, directly intermediate from point of origin to transit point, the rate on the inbound and outbound commodity will be the rate applicable on the inbound commodity from the point of origin, to the rate basing point directly intermediate between the point of origin of inbound commodity and the transit point, in effect on date of shipment of inbound commodity from point of origin, plus the lawfully applicable rate on the commodity covered by the inbound billing matched against the outbound shipment (see Items 760, 770, 810 and 820), from the rate basing point directly intermediate between the point of origin of the inbound commodity and the transit point in effect on date of shipment from point of origin of the inbound commodity plus the transit charge, except that where the commodity covered by the inbound billing matched against the outbound shipment consists of Grain, Grain Screenings or Soybeans, the rate to be applied from the rate basing point will be that applicable to Grain Products in effect on date of shipment from point of origin. (See Items 650 and 660) (c) When a combination rate applicable via the transit point is constructed on a rate basing point located between the transit point and final destination, the rate on the through movement will be that applicable on the inbound commodity from point of origin to such rate basing point, plus the rate lawfully applicable on the outbound commodity therefrom to final destination at time of shipment from point of origin, except that when the inbound commodity consists of Grain, Grain Screenings or Soybeans, the rate to be applied to the rate basing point will be that applicable to Grain Products in effect at time the Grain, Grain Screenings or Soybeans originated plus the transit charge. (d) In no case shall the rate on a shipment be less than the lawful rate from point of origin to the transit point, plus the transit charge, nor less than the lawful rate from the transit point to final destination, plus the transit charge, whichever is higher.
640		When the commodity covered by the inbound billing consists of Copra Meal produced from copra at a prior transit point, the through rate to be assessed will be that applicable on copra or copra meal (whichever is higher) from point of origin or point of importation (as the case may be) of the copra, to the final destination of the outbound product in effect on date of shipment of the copra from point of origin or point of importation (as the case may be) plus the transit charge, except where there are no commodity rates in effect on copra, then copra meal rates will apply.
650	**Exceptions to Item 630** (Continued on next page)	When inbound billing for Cake, corn oil (ground or unground); Cake, soybean oil (not cereal food preparation and not for human consumption); Feed, soybean; Meal, corn oil; Meal, soybean, ground or in flake form (not cereal food preparation and not for human consumption); and Meal, soybean oil, ground or in flake form (not cereal or food preparation and not for human consumption); milled from Corn or Soybeans, as the case may be, under transit tariffs lawfully on file with the Interstate Commerce Commission is surrendered against outbound shipments to destinations in Central, Trunk Line (including Trunk Line Arbitrary Territory) and New England Territories (see Item 50), the following will apply: (a) When a through one-factor commodity rate on grain products is in effect via the transit point from point of origin of the corn or soybeans to final destination of the outbound shipment, such through one-factor commodity rate in effect on date of shipment of the corn or soybeans from point of origin, plus transit charge, if any, will apply. (b) In the absence of a through one-factor commodity rate on grain products as referred to in paragraph (a) above, rate to apply will be that applicable on the inbound shipment of the corn oil cake or meal or soybean oil cake or meal, as described in paragraph (a), from origin of the corn or soybeans to transit point or rate basing point directly intermediate from point of origin of the corn or soybeans to transit point, plus the lawfully applicable proportional or reshipping commodity rate (not class or column rating) on corn oil cake or meal; soybean oil cake or meal or soybean feed as described, from such transit point or rate basing point to final destination of the outbound shipment in effect on date of shipment of corn or soybean from point of origin, plus transit charge.

For Explanation of Abbreviations and Reference Marks, see concluding pages of this tariff.

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Underscoring ours.

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)—(GENERAL RULES AND REGULATIONS GOVERNING TRANSIT PRIVILEGES
APPLICABLE ONLY AT STATIONS MAKING SPECIFIC REFERENCE HERETO

Rule No.	SUBJECT	EXPLANATION
25	RATES AND CARLOAD MINIMUM WEIGHT	Except as otherwise provided: "DOMESTIC TRAFFIC" The through rate to be applied on a domestic shipment will be the lawfully published through rate on the inbound or outbound commodity, whichever is higher, from original point of shipment to final destination in effect at time of (this) shipment from point of origin. In no case shall the through rate on a domestic shipment from point of origin to final destination, plus transit and other charges provided in this tariff, be less than the rate from point of origin to the transit point, plus transit and other charges provided in this tariff, nor less than the rate from transit point to final destination, plus transit and other charges provided in this tariff, whichever is higher. "IMPORT TRAFFIC" The through rate to be applied on an import shipment will be the lawfully published import rate applicable from port of entry to final destination or the import rate from port of entry to transit station, whichever is higher, in effect on date of shipment from port of entry, plus the transit and other charges provided in this tariff. "EXPORT TRAFFIC" The through rate to be applied on an export shipment will be the lawfully published through rate applicable upon export shipment from point of origin to point of exportation, or the export rate from transit point to point of exportation, whichever is higher, in effect at time of shipment from point of origin, plus the transit and other charges provided in this tariff. Ⓣ & ALTERNATING RATES AND MINIMUM WEIGHTS When shipments are subject to alternating rates and minimum weights, the following will govern: (a) When the actual transit weight of the outbound shipment exceeds the weight on which charges were based on one inbound shipment, more than one inbound freight bill may be surrendered as an offset against the outbound shipment, but each portion of the outbound shipments, as applied from each such inbound freight bill, will be charged the carload rate from origin to destination that would have been applicable on basis of the weight of each inbound shipment. (b) When the actual transit weight of the outbound shipment is less than the weight covered by the inbound freight bill surrendered as an offset, the transit weight will be charged the carload rate that would have been charged for such outbound weight from origin to destination. (c) The entire outbound shipment will be subject to the highest carload minimum weight for any of the rates charged and any deficiency in the minimum weight will be treated as non-transit weight and charged the lawfully published carload rate from transit point to final destination in effect at time of shipment from the transit point on the lowest rated commodity in the outbound car.

)—(Rules 30, 35, 40, 45 and 50 transferred to Original Page 13-A.

For explanation of abbreviations, see page 3.
& Reduction.
Ⓣ Not applicable on milling, mixing, malting and other transit privileges on Grain and Grain Products.

C.R.258 C.S.270

Underscoring ours.

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RULES AND OTHER GOVERNING PROVISIONS

SPECIAL RULES AND REGULATIONS

SECTION 4—NYC(C)—PART 1

(Section 4 applies only at stations shown on pages 5 to 7, making reference hereto)

THE PROVISIONS OF THE GENERAL RULES AND REGULATIONS OF SECTION 1 TOGETHER WITH THOSE IN THIS SECTION HAVE APPLICATION

Item	SUBJECT	APPLICATION
800	Provisions of Application	These rules, when the conditions hereinafter stated are observed, and provided the outbound product (except as stipulated in special items provided under Part 2 of this section) is forwarded via the NYC(C) (or via NYC(W) when Transit privilege is accorded at Danville, Ill.), in carloads, will apply to shipments of commodities referred to in Item 250, under the caption "When inbound freight bills are surrendered for:" and hereinafter referred to as "Grain," when consigned (in straight carloads) to Mills or Malt Houses located at points reached by the rails of the NYC(C) intermediate between points of origin of the Grain and final destination of the Product. (See Item 870.)
805	Eligible Commodities	The following Grain will be eligible to receive the milling or malting-in-transit privilege, viz.: (A) Grain from St. Louis, Mo., via East St. Louis, Ill., and the NYC(C). (B) Grain originating at points on NYC(B), NYC(C), NYC(E), NYC(K), NYC(M), NYC(W), NYC(WS), P&LE. (C) Grain originating on foreign roads on which NYC(B), NYC(C), NYC(E) NYC(K), NYC(M), NYC(W), NYC (WS), P&LE receive their local, joint or proportional rate from junction point with connecting lines. (Except as specifically provided for in special items in Part 2 of this section.) (D) Grain covered by special provisions hereinafter made. (E) Grain originating on the B&O (Dayton & Union Branch), when the product is destined to a point described in Item 905, Sections (A) to (I), both inclusive, except as described in Section (O). (F) Except as otherwise provided, specific items in Section 4, Part 2, as amended, applying from stations on the NYC(C), NYC(M) or NYC(W) will also apply on traffic originating at stations on connecting lines not otherwise specifically provided for, when delivered to the NYC(C), NYC(M) or NYC(W) at stations named in the item, subject to the NYC(C), NYC(M) or NYC(W) receiving their local, joint or proportional rate from junction point with connecting line, plus milling-in-transit charge as per Item 810 and penalty charge, if any, provided for in the item.
810	Transit Charge	(a) Except as provided in paragraph (b) the milling or malting-in-transit charge shall be one (1) cent per 100 pounds, but not less than $8.63 per car on the inbound shipment, which shall be in addition to the through rate; except on Mash, Spent Grain, dried, without or with not exceeding 1% of Vitamin A added, carloads, also on Gluten, carloads, the transit charge shall be one (1) cent per 100 pounds but not less than $8.63 per car on the outbound shipment, which shall be in addition to the through rate. (See Exception.) (b) On shipments moving on proportional rates published in WTL Tariff 332-E, Agent W. J. Prueter's ICC A-3866, when originating at points beyond Omaha, Nebraska or Kansas City, Mo., transited at Marion, Ohio, when destined to points beyond Cincinnati, Ohio, south of the Ohio River, the transit charge will be one (1) cent per 100 pounds, but not less than $8.63 per car on the inbound shipment and an additional charge of 4 cents per 100 pounds will also be made which will be in addition to the through rate and will accrue to the New York Central Railroad Company. **Exception**—Will not apply on commodities accorded transit privileges at Bloomington, Champaign, Danville, Pana or Paris, Ill.
815		The through rate to be applied on the inbound commodity (except that covered by Item 805 (c) and its product shall (except in the instances noted hereafter)), be the lawfully published rate through on the inbound commodity or the product, whichever is higher, from the original point of shipment to final destination, in effect at time of initial shipment from point of origin applicable according to the inbound billing which these rules permit to be matched against the outbound shipment, plus the transit charge named in Item 810 of tariff, except that where the commodity covered by the inbound billing matched against the outbound shipment consists of Soybeans the through rate to be applied on the outbound shipment will be that applicable to Grain Products in effect at the time the Soybeans originated, plus the transit charge. **(See Items 240, 865 (1) and Exceptions in Items 845 and 860.)**
820	Rates (Continued on next page)	When the inbound commodity (except that covered by Item 805 (c)) originates at a point from which there is applicable via the transit point no joint through rate on the inbound or outbound commodity to the final destination of the outbound commodity but from which a combination through rate, applicable via the transit point, can be constructed on a basing point, directly intermediate from point of origin to transit point, the rate on the inbound and outbound commodities will (except in the instances noted hereafter) be the rate applicable on the inbound commodity from the point of origin to the rate basing point directly intermediate between the point of origin of the inbound commodity and the transit point, in effect on date of shipment of the inbound commodity from point of origin plus the lawfully applicable local, joint, reshipping or proportional rate on the inbound or outbound commodity, whichever is higher, from the rate basing point directly intermediate between the point of origin of the inbound commodity and the transit point, in effect on date of shipment from point of origin of the inbound commodity, plus the transit charge named in Item 810, except that where the commodity covered by the inbound billing matched against the outbound shipment consists of Soybeans the rate to be applied from the rate basing point will be that applicable to Grain Products in effect on date of shipment from point of origin, plus the transit charge. **(See Item 865 (1) and Exception in Item 845.)**

For Explanation of Technical Terms, Abbreviations and Reference Marks, see concluding pages of this tariff.

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Underscoring ours.

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FOR PRECEDING ITEM (315) SEE PAGE 19.

SECTION 2

SPECIFIC RULES GOVERNING THE FOLLOWING PRIVILEGES
CLEANING,CLIPPING,DRYING,GRADING,MIXING,SACKING,STORING OR TREATING OF GRAIN
FOR GENERAL RULES AND REGULATIONS,SEE SECTION 1,PAGES 15 TO 19

Item	SUBJECT	EXPLANATION
250	APPLICATION AND DEFINITION OF TRANSIT PRIVILEGE	EXCEPT AS OTHERWISE PROVIDED: (A) The transit rules as contained in Section 2,will apply at all stations on the NYC&StLRR,as named on pages 6 to 11 (See Exceptions 1 and 2 below). (B) GRAIN,when in carloads,may be stopped for unloading into elevators,or warehouses,hereinafter termed transit houses,for the purpose of CLEANING, CLIPPING,DRYING,GRADING,MIXING,SACKING,STORAGE OR TREATING; and the Grain,or its equivalent as hereinafter set forth subsequently reforwarded to destinations beyond the transit point,subject to the rules provided herein. (C) Wherever the term "Grain" appears in this tariff it should be understood to mean all of the Commodities named in Section 2 of Agent H.R.Hinsch's Tariff 600-H,I.C.C.4644,Ill.C.C.656,I.R.C.D-901,Ohio 2511,P.S.C.N.Y.353,Pa.P.U.C. 408,N.Y.C.& St.L.R.R.-F.T.2027-H.(SEE NOTE A). (File 5134-L-30;L-383) (Inf.Cir.24954-32709) NOTE A - The term "Screenings" as used in Section 2 of Agent H.R.Hinsch's Tariff 600-H,I.C.C.4644,Ill.C.C.656,I.R.C.D-901,Ohio 2511,P.S.C.N.Y.353,Pa.P.U.C. 408,N.Y.C.& St.L.R.R.-F.T.2027-H,means grain screened from the original grain. Screenings from different kinds of grain may be mixed and the mixture forwarded against any one kind of grain entering into the mixture. (Inf.Cir.24954-32709) (File 5134-L-383)

EXCEPTIONS

(1) The rules in section 2 will not apply in connection with transit privileges at the following points:

I.C.C.	Ill. C.C.	I.R.C.	P.S.C. N.Y.	N.Y.C.& St.L.R.R. G.F.D.	Agents No.	Issued By	Applying at	Description
6069	.....	.....	1251	103-U	.....	N.Y.C.& St. L.R.R. . . .	Buffalo. . .N.Y.	Transit privileges on Grain and Soybeans.
4652	657	.....	.....	867-T	413-T	H.R.Hinsch. .	Chicago. . .Ill.	Transit privileges on Grain and Soybeans.
4318	603	.....	.....	1176-C	323-D	H.R.Hinsch. .	Alton. . . .Ill. E.St.Louis .Ill. Madison. . .Ill. Granite City. . . .Ill.	Transit privileges on Grain and Soybeans.
4640	654	.....	.....	935-R	634-D	H.R.Hinsch. .	Peoria . . .Ill.	Transit privileges on Grain and Soybeans.
4522	637	D-872	.....	931-G	645-C	H.R.Hinsch. .	Bloomington.Ill. Gibson City.Ill.	Transit privileges on Grain and Soybeans.

TRAFFIC ORIGINATING ON CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY.

(2) On traffic originating at stations on the C&EIRR,the rules contained in Section No.2 will apply only when the outbound shipment from the transit point is forwarded to N.Y.C.& St.L., Stations Fairview,Pa. and east via The N.Y.C.& St.L. or to Stations on connecting lines via Buffalo,N.Y.,when moving via the N.Y.C.& St.L. to Buffalo,N.Y.,also to stations in Trunk Line and New England Territories (See Item 205) on or reached via The Pennsylvania R.R. when moving via N.Y.C.& St.L.R.R.,Ashtabula,Ohio or Cleveland,Ohio,Pennsylvania R.R. also Stations on the Western Maryland R.R. and Reading Co. when moving via N.Y.C.& St.L. Pittsburgh Jct.,Ohio,P.& W. V.R.R.,Connellsville,Pa.

(File 5134-L-310; 5308-A-533)

255	RATES	The through rate to be applied to transit Grain shall be the lawfully published rate through from the original point of shipment to final destination in effect via transit point at the time of initial shipment from point of origin applicable to the Commodity covered by inbound billing which these rules permit to be matched against outbound shipments. (SEE ITEMS 65,70,PARAGRAPH (C) OF ITEM 260 ALSO ITEMS 275 TO 285). NOTE - In the instance of Oat Clippings matched against inbound Oats,the through rate to apply shall be the Grain Product rate,subject to the minimum weight applicable to Oat Clippings.

Underscoring ours

317

[fol. 317]

230

[fol. 318] Statement of Rates from Kankakee Belt Line of N.Y.C. to Chicago and Kankakee omitted from the record here. Printed at page 119.

STATEMENT OF GRAIN PRODUCTS RATES FROM WESTERN ORIGINS TO NEW YORK, NEW YORK (DOMESTIC)

FROM	Group	(X-196)	(X-206) 12-28-56
Ashtabula, Ohio	66 1/2	43 1/2	45 1/2
Cleveland, Ohio	71	48	50 1/2
Toledo, Ohio	78	49 1/2	52
Wauseon, Ohio	84	52 1/2	55
Bryan, Ohio	85	52 1/2	55
Edgerton, Ohio	87	52 1/2	55
Waterloo, Ind.	90	56	59
Kendallville, Ind.	92	56	59
Elkhart, Ind.	96	62 1/2	65 1/2
La Porte, Ind.	98	64	67
Porter, Ind.	99	64	67
Schneider, Ind.	100-B 100-A	L-66 P-49 1/2	L-69 1/2 P-52
Kankakee, Ill.	100-B 100-A	L-66 P-49 1/2	L-69 1/2 P-52
Goodrich, Ill.	100-F	[1] 54 1/2	[2] 57 1/2
Dwight, Ill.	100-G	[1] 54 1/2	[2] 57 1/2
Streator, Ill.	100-K	[1] 54 1/2	[2] 57 1/2
TO			
Moronts, Ill.	100-K	[1] 54 1/2	[2] 57 1/2

[1] - Rate based on 5¢ (X-196) to Kankakee thence 49 1/2¢(X-196) beyond, effective 12-15-56.

[2] - Rate based on 5 1/2¢ (X-206) to Kankakee thence 52¢(X-206) beyond, effective 12-28-56.

TARIFF AUTHORITY:
Agent H. R. Hinsch's I.C.C. No. 4403
N.Y.C. Tariff 701-A, I.C.C. No. 1169

L=Local Rate
P=Proportional Rate

Comparison of Corn vs. Corn Products Rates From Moronts, Ill., (NYC) to Eastern Destinations on Domestic Traffic

TO: (On NYC RR)	Whole Corn Rates (X-206)	Corn Products Rates Eff. 12-15-56 (X-206)
New York, N. Y.	75 1/2	57 1/2
Boston, Mass.	77 1/2	59 1/2
Albany, N. Y.	73 1/2	55 1/2
Utica, N. Y.	70 1/2	52 1/2
Syracuse, N. Y.	69	51
Rochester, N. Y.	69	51
Buffalo, N. Y.	64	45 1/2
(On P.R.R. R.R.)		
New York, N.Y.	75 1/2	57 1/2
Philadelphia, Pa.	73 1/2	55 1/2
Harrisburg, Pa.	72 1/2	54 1/2
Altoona, Pa.	67 1/2	49 1/2
Pittsburg, Pa.	64	45 1/2
(On Erie RR)		
New York, N.Y.	75 1/2	57 1/2
Goshen, N.Y.	75 1/2	57 1/2
Binghamton, N. Y.	69	51
Bath, N.Y.	69	51
Attica, N.Y.	69	51
Buffalo, N.Y.	64	45 1/2

TARIFF AUTHORITY:
Agent Hinsch's I.C.C. No. 4403
Agent Hinsch's I.C.C. No. 3490
Agent Hinsch's I.C.C. No. 4499
NYC Tariff 701-A, I.C.C. 1169

[Vol. 320]

[fol. 321]

BEFORE THE INTERSTATE COMMERCE COMMISSION

PROTEST OF A. L. MECHLING BARGE LINES, INC. AGAINST APPLICATION FOR FOURTH SECTION RELIEF—Filed July 18, 1957

Fourth Section Application No. 33955, E. R. No. 2386

Tariff Reference: Supp. No. 126, N.Y.C. Tariff No. 701-A, R. T. Waite, I.C.C. No. 1169, Page No. 2; Supp. 84, H. R. Hinsch's Tariff 245-H, I.C.C. No. 4403; Supp. 38, H. R. Hinsch's Tariff 535-C, I.C.C. No. 4499

Proposed Effective Date: July 30, 1957

Commodity: Corn and Corn Products

From: Points on New York Central Railroad west of Kankakee, Illinois

To: Kankakee, Illinois for Transit to destinations in Central, Trunkline, and New England Territories

Rate: Proportional of 5¢ (subject to Ex Parte 206), plus proportionals to eastern destinations

A. L. Mechling Barge Lines Inc., by: Edward B. Hayes, Registered Practitioner, 135 South La Salle Street, Chicago 3, Illinois.

[fol. 322]

BEFORE THE INTERSTATE COMMERCE COMMISSION

PROTEST AGAINST APPLICATION FOR FOURTH SECTION RELIEF

Protestant, A. L. Mechling Barge Lines Inc., respectfully protests against the Application for Fourth Section Relief, I.C.C. No. 33955, E. R. 2386 filed by the Traffic Executive Association-Eastern Railroads in connection with Supplement No. 126, New York Central Railroad Company Tariff No. 701-A, I.C.C. No. 1169, and in support of its protest, shows the following:

I. Protestant is a common carrier by water on the Illinois Waterways holding Interstate Commerce Commission Certificate of Authority No. W-630 and Illinois Commerce Commission Certificates of Public Convenience and Necessity, is and has been a carrier of substantial amounts of corn from Spring Valley, La Salle, Ottawa, Seneca and Morris, Illinois to Chicago, Illinois, and is one of the water carriers named as a competing water carrier in Fourth Section Application E. R. No. 2386, I.C.C. No. 33955, accompanying Supplement No. 126.

[fol. 323] II. The rates for which Fourth Section relief is now sought are rates of New York Central Railroad Tariff No. 701-A, I.C.C. No. 1169, and supplements, and are designed to establish and maintain a proportional rate of 5¢ per cwt. (subject to Ex Parte 206) for corn and corn products from points on the New York Central Railroad west of Kankakee, Illinois to Kankakee, Illinois in transit to destinations in Central, Trunkline, and New England Territories at the proportionals established for many years from Kankakee, Illinois to these points. Related changes here protested were made effective December 15, 1956, in Supplement 84 to Agent H. R. Hinsch's Tariff 245-H, I.C.C. No. 4403, and Supplement 38 to Agent H. R. Hinsch's Tariff 535-C, I.C.C. No. 4499, to permit the combination of the proportionals into aggregate rates to the eastern destinations without protecting the local rate from Kankakee, even though the combination was lower than the local rate from Kankakee and from points in Indiana. It is admitted by the railroads that the aggregates of these proportional rates will constitute departures from the Fourth Section and in Fourth Section Application, E.R. No. 2386, I.C.C. No. 33955, the approval of the Commission is sought for [fol. 324] these departures.

III. The 5½¢ rate presently is in effect under Section 4 of Supplement 122 to NYC Tariff No. 701-A, except that it is not under that supplement available for shipments destined to points in Central Territory. The rates originally were filed under Supplement No. 114, which became effective December 15, 1956. Subsequently Supplement No. 120

was filed to exclude their application to shipments routed via Chicago. Before it became effective, however, Supplement No. 120 was superseded by Supplement No. 121, in order to make the rate again available for shipments routed via Chicago. Supplement No. 122 later replaced Supplement 121. It is admitted in the application for Fourth Section relief filed herein that all these supplements contain or contained Fourth Section departures and that the Interstate Commerce Commission has not granted any authorization for such departures. All such supplements, including Supplement No. 122 presently in effect, therefore were promulgated in violation of Section 4 of the Interstate Commerce Act and the rate promulgated therein was and is illegal. Supplements No. 122 to NYC Tariff 701-A, [fol. 325] 84 to H. R. Hinsch's Tariff 245-H, and 38 to H. R. Hinsch's Tariff 535-C should therefore be withdrawn and the rates in effect prior to December 15, 1956, subject to Ex Parte 206, should be restored, pending hearing on Fourth Section Application No. 33955. The Commission has plenary power under Section 15(1) to order such action by the respondent railroads where the violation of the Act is admitted as it is here, and the Commission is hereby requested to enter such an order.

IV. The protested rate is urged in the Fourth Section Application as necessary to meet truck-barge competition, and is estimated in the application to involve a maximum diversion by the railroad to its rail transportation and from barge transportation of 6,000,000 bushels of corn annually. Protestant, on information and belief, denies the allegation in the application that no corn had moved by New York Central from stations west of Kankakee prior to December 15, 1956.

Moreover, rates for the movement from the points west of Kankakee to Kankakee prior to the effective date of Supplement No. 114 (December 15, 1956), ranged from 14.5¢ to 23¢, and no allegations or showing of any sort are made in the Fourth Section Application that the proposed reduction to from 24% to 38% of the previously existing rates [fol. 326] will be compensatory to the railroad, or that such reductions would not actually produce a deficit, or that the

amount of corn carried eastward by the railroads from Chicago and Kankakee would be increased sufficiently over the amounts now carried to compensate for the deficits incurred under the 5½¢ rate to Kankakee.

Furthermore, since the rate is applicable to corn going to eastern points via Chicago and the proportional rate from Chicago to such points is the same as the proportional rate from Kankakee to such points, the New York Central Railroad is, in effect, offering transportation from the points west of Kankakee to Chicago at a rate of 5½¢ on that part of the corn which is carried to the eastern destinations from Chicago on the New York Central Railroad's own lines—and even with respect to grain carried to eastern destinations from Chicago on other lines the New York Central under said protested supplements is carrying the grain from the points west of Kankakee to Chicago for the 5½¢ rate (unless it is receiving a division of the Kankakee proportional from the carrier making the eastward haul from Chicago as to which it neither makes nor offers to make any showing). Receipt of such division [fol. 327] has not been alleged in Fourth Section Application No. 33955 and, if it were alleged, it would be clear that the eastbound carrier was carrying ex-rail grain east from Chicago at a rate lower than that contemporaneously charged for its service east from Chicago on ex-barge grain, in violation of the order entered by this Commission with respect to proportional rates for grain after the decision of the U. S. Supreme Court in *A. L. Mechling, et al.* v. *U. S. et al.*, 330 U. S. 567. The rail distance via N.Y.C. from Moronts to Kankakee is, on information and belief, 83.5 miles and from Kankakee to Chicago is 54.4 miles.

V. There is, further, no showing in said Fourth Section Application No. 33955 that such a drastic rate reduction is required to meet truck-barge competition, since the only allegation made is that the barge rates from the river points nearest the points on the New York Central Line west of Kankakee range from 4.25¢ per cwt. to 5¢ per cwt., which figures are without any Ex Parte 206 increase. No showing is made of the cost of trucking such grain to the river points, nor of other additional costs paid by the shipper.

such as the cost of trimming, incidental to carriage by barge, but not to carriage by rail.

[fol. 328] Average trucking charges to the nearest river elevator at the distances listed in Exhibit 5 attached to the said rail application, from the rail elevators and their immediate vicinity, on information and belief, recently were (and have not decreased) as follows:

Station	Highway Miles	Truck Charges Per Cwt.	Barge Rate To Chicago From Nearest River Elevator
Union Hill	28	6.4¢	4.25¢
Reddick	28	6.4¢	4.25¢
Blair	25	7.0¢	4.25¢
Dwight	19	6.0¢	4.25¢
Sunbury	18	6.0¢	4.25¢
Budd	17	6.0¢	4.50¢
Missal	19	6.0¢	4.50¢
Streator	15	5.7¢	4.75¢
Milla	13	5.7¢	4.75¢
Lostant	12	5.7¢	5 ¢
Priscilla	11	5.7¢	5 ¢
McNabb	10	4.1¢	5 ¢
Granville	4	3.5¢	5 ¢
Moronts	4	3.5¢	5 ¢

In addition river elevation costs, on information and belief, recently averaged (and have not decreased) about 2.7¢ per cwt. and trimming and shovelling costs about 1.3¢ per cwt. Thus the total expense to Chicago via truck and barge from any of the rail elevators varies from 12.5¢ at Moronts and Granville to 15.25¢ at Blair. The 5½¢ rate is therefore calculated to, and has eliminated any possibility of any barge competition (to say nothing of preserving the in-

[fol. 329] herent advantage of the low cost barge transportation, which is being destroyed by the rate relation between rail and barge which the Commission is being asked to approve, all in direct defiance of the Transportation Act of 1940 and of the U. S. Supreme Court in *A. L. Mechling et al.* v. *U. S., et al.*, 330 U. S. 567 (1946).

Thus, whereas because of the inherent low cost advantage of barge transportation as compared to rail transportation the river elevators formerly were able to bid more for corn than could the rail elevators, the situation has now been reversed, and protestant avers upon information and belief that, because of the extremely low rate promulgated by the New York Central, rail elevators on the New York Central west of Kankakee are now bidding from 5¾¢ to 9¢ per cwt. more for corn to be transported on the N.Y.C. rails than the river elevators can bid for corn to be transported by barge, and far more than rail elevators in that area on other railroads can bid. A comparison of these differences in the grain prices bid with the trucking charges shown above, demonstrates that even sellers in the immediate area of the river elevators can profitably truck their corn to the New York Central rail elevators, and protestant [fol. 330] upon information and belief avers that most of the corn available for market in the area of the river elevators is now being so trucked. Thus the area supplying the river elevators which had been created by their natural position has been artificially and almost completely diverted to the rail elevators on the New York Central, notwithstanding the inherent low cost advantage of the barge transportation.

Moreover, the limitation to 6,000,000 bushels annually on the diversion of traffic (which the Traffic Executive Association-Eastern Railroads states in the said application for authority to depart from the 4th Section of the Act will be imposed by the capacity and equipment of the rail elevators involved) takes no account of portable loading facilities which are already in use at the N.Y.C. rail origins in question, the use of which can also rapidly be expanded. Nor does it take into account the possibility of expansion of permanent capacity and equipment of rail elevators at such N.Y.C. rail origins. Thus the projected 41% diversion of barge traffic to rail, which by itself would seriously injure the barge carriers, appears to be a gross underestimate, [fol. 331] of what will be in fact practically a 100% diversion to N.Y.C. rail of corn originating in the area in question.

VI. Furthermore the 5½¢ rate is so low that it has invited and, in fact started, a rail rate war. Lines of the Gulf, Mobile & Ohio Railroad, Chicago, Rock Island & Pacific Railroad, Atchison, Topeka & Santa Fe Railway, Chicago, Burlington & Quincy Railroad, Wabash Railroad, Chicago & Eastern Illinois Railroad and Illinois Central Railroad are close enough to the NYC line west of Kankakee to make it profitable to truck grain from stations on these lines or from areas formerly supplying stations on these lines to stations on the NYC line because of the present freight rate differences. As a result both the first two named railroads have given notice of their intention of reducing their rates on corn and corn products from points in this area. Prior to the institution of this 5½¢ rate, these rail rate levels had been stable for many years. After the 5½¢ rate had been in effect for some months, the Gulf, Mobile & Ohio Railroad, in making application to the Illinois Freight Association to reduce such rates on its own line, stated:

> "• • • it would appear necessary to view the situation in the light of individual interest."

[fol. 332] Thus with the individual action undertaken by the New York Central, followed by the Chicago, Rock Island & Pacific Railroad's proposed reduction the avowed intention of the G. M. & O. to act in its own interest only, the way appears to be prepared for a rail rate war that will injure the participating railroads and divert all corn from barges to the rails in the area from Peoria to Chicago.

VII. The 5½¢ rate, together with the abolition of the requirement that the local rail charge for said service to eastern destinations shall from Kankakee, be no more than the rate for rail service to the same destinations from points west of Kankakee, has reduced and will continue to reduce the amount of corn and corn products marketed in Chicago or processed there. Routing via Chicago from Kankakee is not permitted to destinations in Central Territory. Agent H. R. Hinsch's Tariff No. 535-C, I.C.C. No. 4499. The 5½¢ rate is so low that corn from sources which normally supply Chicago now is diverted to Kankakee for shipment to destinations in Central, Trunkline, and New England Territories. Protestant is advised that of approximately 1,350

cars of grain originating at the rail elevators in the area of the N.Y.C. tracks west of Kankakee during the six months [fol. 333] ending on June 30, 1957, which normally moves via Chicago, less than half were routed via Chicago. The rate is thus a gross discrimination against the City of Chicago in violation of Section 3(1) of the Interstate Commerce Act. Similarly the 5½¢ rate and the abolition of the requirement that the local rail charge for rail service to eastern destinations from Kankakee shall be no more than the rate for rail service to the same destinations from points west of Kankakee is a discrimination against cities such as Peoria, Milwaukee, Decatur, Paris, Danville, Joliet, Cairo and St. Louis, where a similar requirement still applies; and also is a discrimination against points in Indiana, whose local rates until December 15, 1956, had been fixed on a scale with the Kankakee local rate that gives effect to the differences in distances to Central, Trunkline, and New England Territories.

It necessarily must be discriminatory to permit an abnormally depressed combination rate through a rail junction such as Kankakee, which is not located on navigable water and has no particular advantage from its location, without permitting similarly depressed combination rates through all other rail junctions similarly situated.

[fol. 334] The Relief Carrier has the burden of sustaining the lawfulness of its said 5½¢ rate. This protestant denies that said rate is lawful under the National Transportation Policy; denies that said rate is lawful under Section 1, Section 2, Section 3, or Section 4 of the Interstate Commerce Act when administered and enforced in accordance with the National Transportation Policy, enacted by Congress in 1940 as an amendment to that act; and protestant shows that the petition for approval of said rates lacks even averments that show that lawfulness of said rate in said particulars.

Wherefore, protestant prays that the application herein be dismissed summarily for failure to make any showing that the proposed rate is compensatory, that it is required to meet competition, and that it will preserve the inherent advantage of low cost water transportation, that it is in

accordance with Sections 1, 2, 3 or 4 of the Interstate Commerce Act when administered in accordance with the National Transportation Policy which is the governing part of that Act; and further, that the Relief Carriers be ordered to cease and desist from exacting the rate specified in Sec. 4, Supp. 122, NYC Tariff 701-A, I.C.C. No. 1169, and [fol. 335] to restore the rates as they existed prior to December 15, 1956, subject to increases in Ex Parte 206, by cancellation of tariff references noted below; or if such action be not taken that the above application be set for hearing in Chicago, Illinois, and that pending entry of a final order in this proceeding by the Commission the Relief Carriers be ordered to cease and desist from exacting the rate specified in Sec. 4, Supp. 122, NYC Tariff 701-A, I.C.C. No. 1169, to restore the Kankakee local rate as the minimum for combinations of proportional rates across Kankakee, and otherwise to restore the rates for the points specified in such Section 4 as they existed prior to December 15, 1956, subject to increases in Ex Parte 206, by cancellation of:

(1) All rates on Corn to Kankakee, Illinois, originally established in Section 4, Page 3, Supplement 114, New York Central Railroad Company Freight Tariff 701-A, I.C.C. 1169.

(2) All rates on Corn to Kankakee, Illinois, published in Section 4, Page 40, Supplement 122, New York Central Railroad Company Freight Tariff 701-A, I.C.C. 1169, which is a re-issue of the rates covered by paragraph (1).

[fol. 336] (3) Item 279 (new) and the concluding part of the Exception in Note 20, which refers to Item 279, all on Page 2, Supplement 84, Central Territory Railroads Tariff Bureau Freight Tariff 245-H, I.C.C. 4403, which originally became effective December 15, 1956.

(4) Item 279 on Page 17 and the concluding part of the Exception in Note 20, which refers to Item 279 on Page 11, both in Supplement 93, Central Territory Railroads Tariff

Bureau Freight Tariff 245-H, I.C.C. 4403, which is a reissue of the provisions of paragraph (3).

(5) Paragraph B-6 of Exceptions to Note 45, shown on Page 4, Supplement 38, Central Territory Railroads Tariff Bureau Freight Tariff 535-C, I.C.C. 4499, originally effective December 15, 1956 and still in effect.

Respectfully submitted,

A. L. Mechling Barge Lines Inc., By Edward B. Hayes, Registered Practitioner.

135 South La Salle Street, Chicago 3, Illinois.

July 16, 1957.

[fol. 337] Certificate of service (omitted in printing).

[fol. 338]

AMENDMENT NO. 3 TO FOURTH SECTION APPLICATION BY TRAFFIC EXECUTIVE ASSOCIATION—EASTERN RAILROADS—Filed July 22, 1957

Commission's No. 33955
E. R. No. 2386

July 19, 1957
File: C1301-383

To the Interstate Commerce Commission,
Washington 25, D. C.

O. E. Schultz, Vice-Chairman, Traffic Executive Association—Eastern Railroads, for and on behalf of carriers parties to Fourth Section Application No. 33955, hereby amends said application to the extent and for the reasons shown below.

I

Amend application by adding the following paragraph directly before the last paragraph on Page Two thereof:

"The proportional rates for which relief is sought herein, will apply from the involved Illinois stations via the New York Central Railroad (W) direct to Kankakee as published in NYC RR Tariff 701-A, ICC No. 1169, thence via routes from Kankakee that presently

apply in connection with proportional rates therefrom, as more fully shown in Agent H. R. Hinsch's Tariff 245-H and 535-C, ICC Nos. 4403 and 4499 respectively."

Amend Page Three of the application by adding the following directly following the last paragraph thereon:

"The only additional departure that would occur in connection with the observance of these combination rates would be via the direct and indirect routes at origins where the through combination rates from the more distant points would be lower than the local rates from Kankakee, Illinois and other origins east thereof. [fol. 339] Technically, departures would also occur at destinations, which are no different than those that presently occur in connection with the proportional or reshipping rates from Kankakee, Illinois, which are protected under relief afforded by Fourth Section Order No. 18407, issued pursuant to Fourth Section Application No. 32292. However, no new departures would be created at destinations by observance of the factors to and from Kankakee, and relief would be only necessary at destinations in the aggregate of intermediate rates via direct and indirect routes in departures of the same type in character, that occur in the proportional rates mentioned above from Kankakee. These rates in the aggregate would be 5½¢ higher to all points of destination over the proportional rates in effect from Kankakee."

This application is being further amended pursuant to telegram received from Secretary H. D. McCoy, dated July 11, 1957.

Wherefore, your applicants respectfully pray that the relief sought in the application, as amended, be granted.

[fol. 340] All of which is

Respectfully submitted

....., Vice-Chairman, Traffic Executive Association—Eastern Railroads, Agent for Applicants, One Park Avenue, New York 16, N. Y.

Duly sworn to by O. E. Schultz, jurat omitted in printing.

[fol. 341]

PETITION OF NORRIS GRAIN COMPANY OF PROTEST AGAINST FOURTH SECTION AUTHORITY 33955—Filed July 22, 1957

Mr. Harold D. McCoy, Secretary
Interstate Commerce Commission
Washington 25, D. C.

Dear Sir:

The Norris Grain Company respectfully protests the following Fourth Section Application and hereby petitions the Interstate Commerce Commission to enter upon an investigation and inquiry into the lawfulness thereof, and to grant a public hearing in order that the Norris Grain Company and other interested parties may express their views and be heard. The Fourth Section Application referred to is designed as:

Fourth Section Application I.C.C. 33955 issued by O. E. Schultz, Vice Chairman, Traffic Executive Association —Eastern Railroads, dated June 28, 1957 and publicized in the Federal Register Saturday, July 6, 1957.

In support of its protest, this petitioner respectfully states:

I

This petition is filed in behalf of the Norris Grain Company, a corporation existing by and under the laws of the State of Illinois with offices in the Board of Trade, 141 West Jackson Boulevard, Chicago 4, Illinois, who own and oper-
[fol. 342] ate the Calumet Elevator, 3017 East 102nd Street, and the Norris Elevator, 98th Street and the Calumet River, with a combined capacity of 4,950,000 bushels, and several other elevators located along the Illinois Waterways. The Norris Grain Company engages in the purchasing, storing and reshipping of whole grains via rail and barge and are vitally interested in the rates and charges affecting this traffic from points in the State of Illinois and surrounding territory via Chicago markets when destined to points in Central Freight Association, Western Termini, New England and Trunk Line territories.

II

Fourth Section Application, I.C.C. No. 33955, dated June 28, 1957, was issued by O. E. Schultz, Vice Chairman, Traffic Executive Association Eastern Railroads, for and on behalf of carriers, parties to Agent H. R. Hinsch's Tariff No. 245-H, I.C.C. No. 4403, and Tariff No. 535-C, I.C.C. No. 4499, in addition to New York Central Railroad Tariff No. 701-A, I.C.C. No. 1169. The application seeks authority to maintain rates from origins on their Kankakee Belt line, viz., Moronts, Illinois to Van's Siding, Illinois, without observing the long and short-haul provision of Section 4 (1) of the Interstate Commerce Act. The New York Central Railroad seeks relief in connection with traffic to Central Freight Association Territory, other than Western Termini points, scheduled to become effective July 30, 1957, in Supplement No. 126, to New York Central Tariff 701-A, I.C.C. No. 1169, and applying in connection with rates published in Agent H. R. Hinsch's Tariff 535-C, I.C.C. No. 4499.

This petitioner has filed concurrently with this protest [fol. 343] a petition for investigation and suspension of Supplement No. 126 to New York Central Tariff 701-A, I.C.C. No. 1169, for reasons stated therein, and will vigorously protest the above entitled Fourth Section Application 33955 and its effects on origins in Illinois and surrounding territory to the entire Central Freight Association Territory, Western Termini points and Trunk Line and New England territory.

We believe that the rail carriers are entitled to meet competition provided, however, it is done in a lawful manner and not in contravention to the National Transportation Policy or the Interstate Commerce Act. The New York Central in their application refers repeatedly to barge competition, and they have only undertaken to meet a small segment thereof in behalf of a select group of shippers to the gross unjust discrimination against others.

It will also be noted in their application the New York Central seeks to originate traffic on their Kankakee Belt Line between Moronts, Illinois, and Van's Siding, Illinois, and move same through Kankakee direct to the East on their own rails seeking relief from the flat rate via Kan-

kakee, and do not seek similar relief via Chicago Gateway placing shippers in this area at a disadvantage. Reference is also made to meeting competition moving through the Chicago Gateway on Barge-Rail traffic to the East by publishing rates to and from Kankakee to meet that competitive situation and disregarding Chicago, which is the barge unloading port, and also served by the New York Central, and on which they refuse to meet competition where it actually exists, thereby discriminating directly against the [fol. 344] very interchange point on which their entire proposition is based.

The manufacturing, milling and processing of grain is very important to the Norris Grain Company and should be on an equal basis as to drawing grain from the same origin-territory and selling competitively at destination.

III

The Norris Grain Company would like the opportunity, along with other interested parties in the grain trade, to appear before the Interstate Commerce Commission and express their views in this very important matter.

IV

As previously stated, it is our opinion that rail carriers should have the opportunity of meeting their competition at a fair and reasonable level of rates, not an unfair level with an intent to destroy other competitive markets in the vicinity.

We also approve and join in the Petition filed by the Transportation Department of the Chicago Board of Trade, of which we are a member, and accept their supporting exhibits as factually representing our position and thereby avoid being repetitious in supporting our petition with the voluminous detail and exhibits of which they have so adequately treated.

[fol. 345] Prayer

Wherefore, the petitioner prays that the Fourth Section Application herein protested be made the subject of an investigation by the Interstate Commerce Commission and

that such investigation embrace also the extension of the application of the rate from Illinois points via Kankakee, Illinois, to Official Territory in the aforementioned Supp'ment No. 126 to New York Central Tariff 701-A, I.C.C. No. 1169, and that each of the aforementioned investigations be joined and made the subject of public hearing at Chicago, Illinois, or such place as to the Commission seems appropriate for the purpose of permitting all shippers and interested parties to appear and fully present their case in opposition to the granting of this Fourth Section Application and the extension of the rate application.

All of which is,

Respectfully submitted,

Norris Grain Company, V. M. Conley, Manager of Transportation, 141 West Jackson Boulevard, Chicago 4, Illinois, Dated at: Chicago, Illinois, July 17, 1957

Certificate of service (omitted in printing).

* * * * *

[fol. 346]

Duly sworn to by Lee H. Wagner, jurat omitted in printing.

[fol. 347]

BEFORE THE INTERSTATE COMMERCE COMMISSION

PETITION OF ILLINOIS GRAIN CORPORATION OF PROTEST AGAINST F.S.A. 33955—Filed July 22, 1957

Mr. Harold D. McCoy, Secretary
Interstate Commerce Commission
Washington 25, D. C.

Dear Sir:

The Illinois Grain Corporation located at 141 West Jackson Boulevard, Chicago 4, Illinois, respectfully protests the following Fourth Section Application and hereby petitions the Interstate Commerce Commission to enter upon a state of investigation enquiring into the lawfulness

thereof and to hold a public hearing in order that petitioner and other interested parties may be heard. The Fourth Section Application referred to is designated as:

> *Fourth Section Application I.C.C. 33955,* issued by O. E. Schultz, Vice-Chairman, Traffic Executive Association-Eastern Railroads under File E. R. 2386 dated June 28, 1957 as publicized in the Federal Register Saturday, July 6, 1957.

In support of its protests this petitioner respectfully states:

I

This petition is filed on behalf of the Illinois Grain Corporation, which is a corporation organized under the laws of the state of Illinois and is affiliated with the Illinois Agricultural Association, which is the state Farm Bureau in Illinois with approximately 195,000 farm families. It [fol. 348] operates a six and one-half million bushel terminal elevator in the Lake Calumet Harbor at Chicago, Illinois. It owns and operates four elevators on the Illinois River and one elevator in Illinois on the upper Mississippi River and one elevator at Tampa, Florida. It has a membership of 159 farmer cooperative elevators in Illinois who own stock in the corporation. Its purpose is to buy and sell grain for its members who move these commodities into and out of the market via barge and rail for its members and is vitally interested in rates and charges affecting their traffic from origins in the state of Illinois and adjacent territory when destined to points in Central Freight Association Territory and Western Termini of Eastern Trunk Lines and east thereof, which is the territory involved in this application.

II

Fourth Section Application, I.C.C. No. 33955 dated June 28, 1957 was issued by O. E. Schultz, Vice-Chairman, Traffic Executive Association-Eastern Railroads for and on behalf of carriers parties to Agent H. R. Hinsch's Tariff No. 245-H, I.C.C. No. 4403 and No. 535-C, I.C.C. No. 4499 in

addition to New York Central Railroad Tariff No. 701-A, I.C.C. No. 1169. It seeks authority to maintain rates without observing the long-and-short-haul provision of Section 4 (1) of the Interstate Commerce Act.

This petitioner, Illinois Grain Corporation, on July 16th, filed a petition for suspension of Supplement No. 126 to NYC Tariff 701-A, I.C.C. No. 1169, which is embraced in this Fourth Section Application 33955. This petition filed by the carriers refers to whole corn originating on its line west of Kankakee, Illinois, but does not apply on whole corn applying from point of origin to final destination. The corn must be milled in transit in order to obtain the proportional in-bound rate. This limits the use of this [fol. 349] rate to a limited group of users and is unfair and destructive, competitive practices. The National Transportation Policy states in part: "It is hereby declared to be the National Policy of Congress to encourage the establishment and maintenance of reasonable charges for transportation services without unjust discriminations, undue preferences or advantage, or unfair or destructive competitive practices."

This petitioner supports the petition for suspension filed by the Board of Trade of the City of Chicago. We believe that the present 5½¢ combination rate over Kankakee, Illinois, which became effective on December 15, 1956, is in violation of Sections 1, 2, 3, 4 and 6 of the Interstate Commerce Act and should be cancelled by the Interstate Commerce Commission, and petitioner respectfully requests that the Interstate Commerce Commission set this for public hearing and assign it at Chicago, Illinois for convenience of parties affected.

Respectfully submitted,

Illinois Grain Corporation, By Thomas J. Crowe, Vice-President and Traffic Manager.

[fol. 350] *Duly sworn to by Thomas J. Crowe, jurat omitted in printing.*

[fol. 351]

BEFORE THE INTERSTATE COMMERCE COMMISSION

AMENDMENT NO. 1 TO PROTEST OF A. L. MECHLING BARGE LINES INC. AGAINST FOURTH SECTION APPLICATION I.C.C. No. 33955, E. R. No. 2386—Filed July 26, 1957

A. L. Mechling Barge Lines Inc. hereby amends its Protest Against Fourth Section Application 33955 heretofore filed in this proceeding as follows:

I.

By adding the following paragraphs as new paragraphs at the end of Section II on Page 3:

"In Amendment 3 to said Fourth Section Application, dated July 19, 1957, the Relief Carriers no longer allege that the origin departures which will occur by reason of the combination rate are only 'technical' departures. It is clear that these departures, created by the extraordinarily low 5½ cent rate and the abolition of the requirement that the combination rate for all-rail transportation be at least equal to local rail rates from Kankakee, are much different in principle from presently approved departures involving all-rail combination rates in which Kankakee proportionals are a fac-

[fol. 352] tor. Formerly the general situation maintained under the Commission's Fourth Section orders was that as to origins west of any reshipping point named in Agent H. R. Hinsch's Tariff 245-H, I.C.C. No. 4403, there was permitted no all-rail rate, combination or otherwise, eastbound lower than the rail rate to the same destinations from the reshipping point or origins east thereof. The present rail application requests authority to depart from that situation as to all origins on New York Central (and New York Central only) at and west of Kankakee, Illinois, for transit via Kankakee.

"One consequence (and the avowed object) of this radical departure is that, as to corn bound to eastern destinations from the origin area near the northern portion of the Illinois River Waterway, the inherent low cost advantage of barge transportation is no longer

reflected by a differential between the combination barge-rail rates and the combination all-rail rates to these destinations from this origin area, with the further consequence that substantially all corn hitherto shipped by barge from this origin area to supply such eastern destinations will be diverted to the rail transportation of the New York Central Railroad."

This amendment is filed pursuant to permission granted in Secretary H. D. McCoy's telegram of July 24, 1957. [fol. 353] Wherefore your protestant respectfully renews its prayer in its protest.

Respectfully submitted,

A. L. Mechling Barge Lines Inc., By: Edward B. Hayes, Registered Practitioner, 135 South LaSalle Street, Chicago 3, Illinois.

Certificate of service (omitted in printing).

[fol. 354]

BEFORE THE INTERSTATE COMMERCE COMMISSION

RESPONDENT'S REPLY TO PETITIONS IN OPPOSITION TO RELIEF REQUESTED IN FOURTH SECTION APPLICATION I.C.C. No. 33955 AND THE VARIOUS PROTESTS AND PETITIONS FOR SUSPENSION—Filed July 30, 1957

Proposed Rates:

(1) 5½-Cent Per Hundred Pound Proportional Rate, Including Ex Parte 206 Increase.

(2) Re-shipping Rates from Kankakee to Central Territory Destinations.

Effective Date:

August 29, 1957 (Special Permission No. 73523) [Original Effective Date July 30, 1957].

Tariff References:

(1) Proposed Rates: New York Central Freight Tariff No. 701-A, Supplement No. 126, I.C.C. No. 1169; H. R. Hinsch's Tariff 535-C, Supp. 41, I.C.C. 4499.

(2) Present Application of 5½ Cent Rate: New York Central Tariff No. 701-A, Supplement 122, I.C.C. No. 1169; H. R. Hinsch's Tariff 245-H, Supp. 93, I.C.C. No. 4403; H. R. Hinsch's Tariff 535-C, Supp. 41, I.C.C. No. 4499.

Commodities:
Corn and Corn Products.

Minimum Weight:
100,000 Pounds Inbound.

Territory:
From—N.Y.C. Stations Specified in Section 4 of Supplement 126.
To—(1) Kankakee, Ill.
(2) Reshipping Rates to Apply Beyond to Points in Central Territory.

Present Application of 5½ Cent Proportional Rate:
Applies in Conjunction with Reshipping Rate to Eastern Trunk Line and New England Territories.

Richard J. Murphy, William C. Leiper, Attorneys for Respondent and Applicant, 1225 LaSalle St. Station, Chicago 5, Illinois.

Dated: July 29, 1957.

[fol. 355] PREFATORY STATEMENT

Respondent and applicant, The New York Central Railroad Company, has been served with numerous protests and petitions for suspension of New York Central Railroad Company Tariff 701-A, Supplement 126, I.C.C. No. 1169 and a like number of petitions in opposition to the granting of the relief requested in Fourth Section Application, I.C.C. No. 33955. In many instances, the petitions for suspension were attached to petitions in opposition. Similarly, the petitions for suspension refer frequently and extensively to matters pertaining to F.S.A. 33955. For these reasons, and in the interest of brevity and convenience,

respondent will reply to each and every protest and petition for suspension and each and every petition in opposition in a single, consolidated reply.

[fol. 356] REPLY

I.

A History of Events Leading to the Filing of Fourth Section Application I.C.C. No. 33955

The New York Central in an effort to meet barge competition established a rate from stations on its Kankakee belt line, located in the heart of the corn country in Illinois. This proportional rate applying on corn to Kankakee was designed to approximately equalize the through transportation charges via all rail movement with the costs which obtain via barge-rail movement. While the barge-rail aggregate does not require relief from the long-short haul clause of the Interstate Commerce Act, the all rail route does require relief when such a route fails to comply with said clause.

In connection with the all rail situation, through rates are published from origin territory to destinations east thereof that are higher than the combination of proportional factors applying to and from Kankakee, Illinois, as illustrated below:

From:	To:	Rates in Cents Per 100 Pounds
Dwight, Ill.	N.Y., N.Y.	.72
Kankakee, Ill.	N.Y., N.Y.	.52
Dwight, Ill.	Kankakee, Ill.	.055
Authority: Agent H. R. Hinsch		—I.C.C. 4403
(Rates include Ex Parte 206)	NYC	—I.C.C. 1169

Rates shown above to N.Y., N.Y. apply on Grain products.

[fol. 357] As a result, appropriate amendments were made in C.T.R. Tariffs 245H and 535C restricting application of the through rates. The opinion prevailed that with restriction of the through rate application and with appropriate Fourth Section relief in effect from Kankakee, no Fourth Section departures were created and publication accordingly was made on December 15, 1956.

The combination rates were restricted to apply only to Western Termini of Eastern Trunk Lines and East thereof. Attention was not focused on Fourth Section departures which this restriction created to Central Territory destinations intermediate to termini stations.

As set forth in F.S.A. 33955 your respondent was advised by the Commission that due to the territorial restriction, unauthorized departures were created at destinations in Central Territory. In order to rectify the situation respondent caused to be listed for consideration before Traffic Executive Association—Eastern Railroads at their May 23, 1957 meeting, a proposal designed to include Central Territory as a destination territory in connection with combination of the water competitive factor to Kankakee, Ill., and proportional factor beyond. The Traffic Executive Association approved this action and implementation was accomplished in Supplement 126 to N.Y.C. I.C.C. 1169 amended to be effective August 29, 1957.

The purpose for which Fourth Section Application E.R. 2386, I.C.C. No. 33955, as amended, was filed is clearly set forth therein and should not require repeating at this time.

Respondent in good faith assumed that outstanding relief properly protected the proportional factor applying beyond the reshipping point. The water competitive factor to Kankakee applied at all intermediate points between Moronts and Van Siding, Ill. It appeared ample protection existed. In order to allow for the application of the [fol. 358] combination rate in lieu of the single factor through rate certain necessary amendments were published in the tariff publishing the through rates. Subsequent investigation revealed that limitations placed on the Fourth Section relief in effect from the reshipping stations re-

stricted the protection of rates only to the observance of the local or flat rate from such reshipping station as the minimum.

The overabundance of words devoted to hypothetical situations which it is possible to conjure up as a result of the requirement that the corn be milled in transit in order to qualify for the combination through rate, is quite surprising to your respondent inasmuch as the Chicago Board of Trade and other interested parties were advised some time ago of respondent's intention to eliminate this qualification as soon as possible after disposal of the Fourth Section technicalities. Your respondent has no control whatsoever of transit rules published by carriers granting transit privileges at various stations in Official Territory. However, the anomalies portrayed should not exist upon elimination of the milling in transit qualification, to any greater extent than contemporaneously is in effect in connection with barge-rail movement.

II.

The Reason for the Rate.

The rate was engendered as a result of processors located in Kankakee, Indianapolis, Danville, Paris and other points in Official Territory exhibiting interest in obtaining rail corn from the country elevator without paying a premium for such billing.

The area west of Kankakee is one of the most prolific in the country for the growing of corn. Since the advent of the barge in great numbers on the Illinois waterway, grain that would normally come to the country elevators located in this area on The New York Central has been trucked to the river terminals, as is succinctly illustrated by the following tabulation of figures:

Receipts at Chicago by Illinois Waterway

Year	Wheat Bu.	Corn Bu.	Oats Bu.	Rye Bu.	Barley Bu.	Soy Bean Bu.	Total Bu.
1935	661,000	723,000	170,000	—	—	—	1,554,000
1936	437,000	1,299,000	33,000	—	19,000	28,000	1,816,000
1937	2,113,000	2,019,000	366,000	—	—	97,000	4,595,000
1938	30,000	—	—	—	—	—	30,000
1939	—	—	—	—	16,000	—	16,000
1940	2,773,000	16,266,000	174,000	—	—	753,000	19,966,000
1941	1,695,000	15,349,000	211,000	—	—	442,000	17,697,000
1942	550,000	15,094,000	53,000	50,000	—	197,000	15,944,000
1943	51,000	12,400,000	180,000	156,000	—	1,000	12,788,000
1944	584,000	13,663,000	108,000	—	—	—	14,355,000
1945	997,000	13,494,000	1,141,000	—	—	728,000	16,360,000
1946	692,000	17,164,000	3,006,000	—	—	1,420,000	22,282,000
1947	1,567,000	29,996,000	1,633,000	5,000	—	1,272,000	34,473,000
1948	2,782,000	28,501,000	2,561,000	7,000	—	2,039,000	35,890,000
1949	3,220,000	38,296,000	4,660,000	16,000	—	4,415,000	50,607,000
1950	1,604,000	45,919,000	5,727,000	5,000	—	6,676,000	59,931,000
1951	1,424,000	39,133,000	3,153,000	2,000	—	6,342,000	50,054,000
1952	1,836,000	40,349,000	2,996,000	—	—	8,195,000	53,376,000
1953	2,632,000	28,253,000	3,953,000	35,000	—	8,128,000	43,001,000
1954	2,567,000	20,612,000	4,036,000	32,000	—	5,205,000	32,452,000
1955	4,186,000	14,887,000	9,853,000	—	—	8,672,000	37,598,000
1956	6,712,000	26,210,000	9,872,000	—	172,000	15,668,000	58,634,000
1957 (1st 6 Mo.)		15,791,000					
1956 (1st 6 Mo.)		12,686,000					

Source: Chicago Board of Trade "Grain Trade Statistical Annual".

In contrast with the above figures, following is the corn movement from the Kankakee Belt stations for the years 1954, 1955 and 1956.

[fol. 359]

[fol. 360]

CARLOAD CORN—1954-55-56

To

From	Chicago 1954-55-56	Kankakee 1954-55-56	Milwaukee 1954-55-56	Battle Creek 1954-55-56	Toledo 1954-55-56	Louisville 1954-55-56	Decatur 1954-55-56	Peoria 1954-55-56	Paris 1954-55-56	Indianapolis 1954-55-56
Union Hill	120 86 175	13 56 38	20 — —	20 — —	— — —	4 — —	4 — —	— 5 —	— — —	— — 14
Reddick	5 5 —	— — —	— — —	— — —	— — —	— — —	— — —	— — —	— — —	— — —
Blair	17 37 32	— 8 8	— — —	— — —	— — —	— 24 —	— — —	— — —	— — —	— — 2
Dwight	23 39 42	— 2 2	— — —	— — —	— — —	— 10 —	— — —	— — —	— — —	— — 2
Sunbury	— — —	— — —	— — —	— — —	— — —	— — —	— — —	— — —	— — —	— — —
Budd	22 28 21	— 8 4	— — —	— — —	— 15 —	— — —	— — —	— — —	— — —	— — —
Missal	30 65 52	11 17 12	— — —	— — —	— 8 —	— — 13	4 — —	— 5 —	— 2 —	— — 1
Streator	— — —	— — —	— — —	— — —	— — —	— — —	— — —	— — —	— — —	— — —
Milla	— — —	— — 5	— — —	— — —	— — —	— — —	8 — —	— — —	— — —	— — —
Lostant	1 36 —	— — 6	— — —	— — —	— — —	— 15 —	— — —	— 5 10	— — —	— — —
Priscilla	2 15 —	— — —	— — —	— — —	— — —	— — —	— — —	— — —	— — —	— — —
McNabb	— 19 30	— — 4	— — —	— — —	— 11 —	— — —	1 1 —	— 2 —	— — —	— — —
Granville	— — 16	— — —	— — —	— — —	— 9 —	— — —	— — —	— — —	— — —	— — —

One bushel of corn weighs 56 lbs., two thousand bushels to the average carload.

Also shown below are the entire grain movements from this area for the years 1950 through 1953 contrasted with the carloads originated at stations on the Kankakee Belt in Indiana immediately east of the area in which the barge competition exists.

West End Elevators

Location	1950	1951	1952	1953
Greenwich, Ill.	106	107	86	72
Van Siding, Ill.	0	0	0	0
Union Hill, Ill.	191	164	201	239
Reddick, Ill.	16	8	0	9
Blair, Ill.	20	28	46	59
Dwight, Ill.	8	32	29	29
Sunbury, Ill.	5	0	4	2
Budd, Ill.	41	51	37	6
Missal, Ill.	82	42	79	29
Altmar, Ill.	0	2	0	0
Milla, Ill.	1	1	29	14
Priscilla, Ill.	8	28	21	10
McNabb, Ill.	12	12	71	0
Granville, Ill.	1	0	67	0
Moronts, Ill.	0	0	0	0
Total	491	475	670	469

Base End Elevators Location	[illegible]	1981	1982	1983
Exline, Ill.	[illegible]	232	283	252
Edgetown, Ill.	4	0	2	3
Illinoi, Ill.	86	77	115	74
Eldridge, Ill.	0	0	80	35
Schneider, Ind.	1484	1486	1576	1577
Schneider, Ind.	104	149	184	149
DeMotte, Ind.	212	143	206	212
Kersey, Ind.	102	89	146	175
Wheatfield, Ind.	53	63	43	69
Tefft, Ind.	55	69	112	112
San Pierre, Ind.	51	44	78	81
No. Judson, Ind.	65	49	109	138
Knox, Ind.	78	57	71	75
No. Liberty, Ind.	40	110	222	291
Total	2623	2568	3227	3243
West End Elevator				
Total	491	475	670	469
Grand Total	3114	3043	3897	3712

[fol. 363] The stations from which the water competitive rate is published runs through typical rural territory. There would naturally be only an insignificant movement of manufactured and miscellaneous commodities originating or terminating in this area. The most valid reason for the existence of these rails is to handle the agricultural products originating in the area contiguous thereto. If this purpose is vitiated, the line cannot assume its proportionate burden in defraying the expense inherent in its maintenance. The weight of such cost is necessarily shifted to another portion of the railroad. This trend ultimately leads to situations which culminate in abandonment proceedings. The end result is most undesirable from the standpoint of all parties involved. The public loses the services of a common carrier for lack of ability to sustain service, the carrier never gains by abandonments, except in a negative fashion, by eliminating the necessity of bearing onerous deficits.

III.

Level of the Rate.

The barge rate published from river terminals on corn is from 4½ cents at Morris, Ill. to 5 cents at Spring Valley, Ill. for an average rate of 4.62 cents per hundred pounds. As a result of these rates, the river terminals draw corn from areas a great distance from the river.

The involved stations on the Kankakee Belt closely parallel the Illinois River as shown in the map attached as Exhibit No. 1. The map indicates the approximate highway mileage to the river terminals. When one considers the measure of the barge rate from the river terminal as compared with the rates published by the railroad before December 15, 1956, the economic reasons for moving the [fol. 364] grain abnormally long distances becomes manifest. The reliance by protestants on truck costs as a factor in the cost of transporting grain via barge is of less significance when consideration is given to the fact that such truck movements only occur because of the financial advantages to be realized from such operations.

The seller of the grain to the river elevators has discovered that it is to his advantage, economically, to by-

Carloads Corn Movement—Six Months 1957

(See opposite page)

	Blair	Budd	Dwight	Granville	Loetant	McNabb	Mills	Missal	Priscilla	Reddick	Streator	Sunbury	Union Hill	Van Siding	Total
Chicago	94	72	24	84	26	92	1	69	36				50		548
Paris	9	12	24		22	10	14	11	1	5	8	3	36		155
Danville	5	16	37		1			6	1	1		2	30		99
Indianapolis	20	15	33		6	9		8		57			115		263
Kankakee	121	36	101	5	60	55	105	67	17	21	18	20	150	33	815
Lafayette													2		2
Buffalo		9											5		14
Schneider			25												25
	255	160	244	89	110	166	112	161	52	84	26	25	388	33	1921

The great outcry that if this adjustment is not summarily cancelled the barge movement will dry up, so to speak, is not borne out by the figures which are available covering the movements via rail versus barge during the first six months of 1957. These figures indicate that while the respondent has enjoyed substantially more traffic than in previous years, its participation still represents only 20% of the total movement. Also worthy of note is the fact that the barge movement was greater during the first half of 1957 than in the first 6 months of 1956, and 1956 was a better year than any since 1953. The wail of impending disaster does not appear justified when considered in the light of the facts. A logical explanation for the continued movement via barge exists. The barge rates which range from 4.25 to 5.00¢ at cross-country river terminals average out to 4.625¢. The going barge rates have not been increased in 1957 while [fol. 366] the rail rate was subjected to Ex Parte No. 206 on December 28, 1956. The current all-rail rate is 5.5¢. This is approximately 119% of the average barge rate.

The statement covering barge movements further indicates the relatively insignificant volume of corn which the barge operators enjoyed two decades ago. The movement at that time was overwhelmingly by rail. The country elevators enjoyed the business for which they were established. For lack of necessity there was only a minor investment in elevator facilities on the river. The situation assumed entirely different proportions after 1940. The rail movement for all intents and purposes vanished.

The non-movement of corn by rail continued unabated until the respondent established a rate designed to compete with the water rates. The barge competitive rate applies for distances ranging from 5.2 miles to 83.5 miles and averaging 46.4 miles. The carload minimum weight of 100,000 lbs. produces minimum revenue of $55 per car. When applied against the average mileage the per car mile earnings are 118.5 cents. This, we consider to be remunerative revenue. The efficacy of the water competitive rate has been established. It has generated sorely needed traffic from the involved stations. It has, however, in no way impeded the

much greater movement via the Illinois Waterways to Chicago, Ill.

IV.

Comparison Barge Versus Rail Costs.

One Protestant (Cargill) indicates certain accessorial costs are necessary when movement is via barge. The protestant loses complete sight of the fact that the same costs are involved in rail transportation as in barge transportation. For example, reversing the situation outlined by one [fol. 367] protestant, trucking expense would likewise be involved from Morris, Illinois to Dwight, Illinois, and a higher rate would prevail for the rail movement.

The comparison further conveniently fails to indicate that the country elevator would also charge elevation. Furthermore Federal inspectors can refuse to test, for grading purposes, cars which have not been leveled. Moreover the shipper has the labor expense of installing grain doors and the proper unloading of the box car after movement is an additional chore which adds to the cost of transporting via rail. Respondent has no access to the actual costs of these operations, however, there would certainly appear to be no great advantage to rail carriage versus barge movement with regard to the incidental costs inherent in the respective modes of transportation. Of significance is the fact that none of the additional charges cited is a published tariff charge and all would depend to a certain extent upon competitive necessity for absorption, efficiency of operation, volume of movement and any number of additional factors beyond the common carriers' control.

The example would tend to indicate that protestant assumes he is entitled to draw grain from under the noses of the rail carriers as readily as if it were originating in his own back yard.

V.

The Proportional Rate Is in Keeping With the National Transportation Policy.

Certain of the protestants and petitioners give lip service to the principle that a railroad should be permitted to meet

its competition and yet they strenuously resist respondent's efforts to apply that principle. The reason is clear, identical rates to those now proposed to Central Territory have met with a small measure of success from the same origins to [fol. 368] Eastern Trunk Line and New England territories. The barge interests are reluctant to permit any inroad, even a modest one, into their virtual monopoly of the corn movement from the northern Illinois origins.

The Kankakee Belt or New York Central West End extends from Zearing, Ill., to South Bend, Ind., through the Northern Illinois Corn Belt (Exhibit No. 2). It passes through numerous farming communities and serves a number of country elevators located on its sidings. The Illinois River flows through the same general area and parallels the Kankakee Belt along the major portion of its line west of Kankakee (Exhibit No. 1). There being little industry along its railroads, the Kankakee Belt is a low traffic density railroad largely dependent upon the transportation of the products of agriculture for its revenues.

While a substantial volume of corn traffic was at one time generated on the Kankakee Belt, between the years 1940 through 1956, the corn traffic originating thereon was negligible. Respondent is informed that the dearth of corn traffic was engendered by the inability of the N.Y.C. elevator operators, under the applicable rates, to meet the bids of elevators located on the river, the latter being favored with low barge rates on the Illinois River to Chicago. During all or a portion of that period most of the elevators located on the Kankakee Belt were forced to cease commercial elevation of grain and became, for the most part, river shippers of grain through a business transaction similar to brokerage. Such rail movements of grain, as there were from the involved origins, were sporadic and consisted of approximately two cars a day from the entire West End.

Respondent's management has long deplored the deteriorated state to which the Kankakee Belt has fallen as a carrier of corn. A railroad with an ideal location running [fol. 369] through the heart of the Northern Illinois Corn Belt, by-passing Chicago with its time-consuming and costly

rail terminals, and having unencumbered access to Eastern lines, and thereby, to the major corn markets in the East, has been unable to attract corn traffic to its rails (Exhibit No. 2).

This deplorable state of affairs existed through December, 1956. However, in June of 1956 respondent's management, in the exercise of their managerial discretion, undertook, by means of proper rate legislative procedures, to publish a proportional rate of 5 cents per hundred pounds from the N.Y.C. country elevators to Kankakee, Ill. to apply in conjunction with reshipping rates to western termini of eastern trunk lines and points east thereof. This basis of rates resulted from conferences between respondent's management and the interested elevator operators, millers and processors, and represents respondent's mature appraisal of the level of rates necessary to meet its barge competition, to encourage the long desired return of a portion of the eastbound corn movement to its rails and to restore the Kankakee Belt to its rightful position as a carrier of corn.

That these rates have achieved a measure of success, albeit a modest one, is perhaps best portrayed by an excerpt from a letter received from one of the shippers involved:

> "Certainly this has put the West End back in business. Grass is no longer growing between the switch tracks, and the main line tracks are not being worn out by the endless stream of trucks which were crossing them on almost every road on their way to the river."

[fol. 370] Thus, a portion of the corn movement from Northern Illinois has been restored to the Kankakee Belt and will continue to so move so long as the 5½ cent proportional rate remains competitive.

On the other hand, the volume of the corn movement which will revert to the Kankakee Belt is limited by many factors. For example, it is limited by the demand for corn products, by the capacity of the N.Y.C. country elevators, by the supply of grain box-cars, by the distance the farmer

must truck the corn to the N.Y.C. elevators, to mention only a few such factors. Respondent estimates that it will recover approximately 6,000,000 bushels of corn traffic annually as a result of the application of the 5½ cent proportional rates to Central, Eastern Trunk Line and New England territories.

Certainly, there is no foundation in fact for the assertions of those protestants and petitioners who state that the proportional rate in question will result in a total diversion of the corn traffic from the barges. Assuming *arguendo*, the impossible, that the proportional rate resulted in a recovery of 12,000,000 bushels of corn annually, the barge movement would in all likelihood still approximate 20,000,000 bushels, for respondent is informed that the average Chicago receipts of corn by barge was 31,250,000 bushels for the past ten years.

Respondent categorically denies that the 5½ cent proportional rate is a destructive competitive practice. Indeed, respondent has shown that during the period that the 5½ cent rate has been in effect to Eastern Trunk Line and New England territories the barge receipts of corn at Chicago have increased substantially over the comparable period for 1956 when said 5½ cent rate was not in effect. All that the barge operators stand to lose is a comparatively small portion of their profits. The National Trans- [fol. 371] portation Policy does not require rail carriers to maintain rates that are too high for fear of cutting profits of carriers by barge. *Miss. Valley Barge Co.* v. *U. S.*, 292 U.S. 282, 288; *Barytes from Missouri Points to Charleston, W. Va.*, 291 I.C.C. 501, 503.

The line of the Kankakee Belt, as previously noted, passes through the heart of the Northern Illinois Corn Belt, bypasses the costly and time-consuming rail terminals of Chicago and has direct and unencumbered access to the eastbound main lines of the New York Central (W) and other eastern lines. These must be construed to be inherent advantages which, under the National Transportation Policy, must be preserved. *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567. Nor does said Policy require the transportation agency having the inherent advantage to

maintain its rates at a level which will enable other forms of transportation to compete successfully. *Compressors-Tecumseh, Mich. to Springfield, Mass.*, 297 I.C.C. 797.

VI.

The 5½ Cent Proportional Rate Restores Country Elevators to a Position of Equality With River Elevators.

Respondent has been informed by the corn processor on its line at Kankakee that irrespective of its geographic advantage of being located on the Kankakee Belt within 5.2 miles of one of the N.Y.C. country elevators (the others ranging from 14.6 to 83.5 miles from Kankakee), said processor was unable to purchase corn from said elevators but was forced, to be competitive with other processors, to purchase its corn requirements from Chicago. This was true despite the fact that the corn purchased at Chicago was grown and harvested on farms within a few [fol. 372] miles of the country elevators located on the Kankakee Belt. In many instances the corn moved by truck past a N.Y.C. country elevator on its way to the river thence by barge to Chicago thence back by rail to Kankakee.

It is respondent's position that the elevator operators located on its line west of Kankakee are entitled to a competitive rate which will enable them to compete with the river elevators in furnishing the requirements of the Kankakee corn processor. The 5½ cent proportional rate has proven its effectiveness in accomplishing this end. Likewise, it eliminates the wasteful transportation involved in moving corn from points a few miles west of Kankakee to Kankakee via Chicago.

VII.

Involved Proportional and Reshipping Rates No Lower Than Necessary to Meet the Competition.

The 5 cent proportional rate (currently 5½ cents) from the N.Y.C. country elevators to Kankakee became effective to the East on December 15, 1956. It is important to note that apparently none of the parties now so vigorously protesting considered the 5 cent proportional to be lower than necessary to meet the competition of the barges. Now, when

the proportional has been increased to 5½ cents and respondent is endeavoring to expand its application to C.F.A. territory so as to eliminate any possible Fourth Section departures in that territory the barge and river elevator operators become quite exercised. As the rates proposed in Supplement 126 to N.Y.C. Tariff No. 701 merely represent the expansion of rates already effective, respondent submits that protestants and petitioners are now estopped from alleging said rates to be less than compensatory or lower [fol. 373] than necessary to meet the competition unless such allegations appear in a complaint.

Furthermore, after rates identical to those protested have been in effect nearly seven months, the barge and river elevator operators present alleged costs incident to barge movement of corn (Cargill protest, p. 3). Respondent submits that certain of the costs shown are not properly shown. For instance, it is respondent's information that the farmer bears the expense of hauling his corn in his truck to the river elevator. Again, it is understood that the charge for elevation at the river elevator and at Chicago includes an element of profit, the measure of which respondent has no knowledge.

Even if the costs cited be proper, protestants have instanced no expense which does not apply equally to movements of corn by rail. Corn is brought to the country elevators by truck and it is elevated twice, once at the country elevator and once in Kankakee, and there are like costs for trimming and shoveling. Indeed, the rail movement requires the additional expense for the installation of grain doors, etc.

The parties raising the question of costs by barge versus costs by rail desire to create the inference that the barge competitive rail rate must be placed on a differential above the transportation costs by barge. Respondent respectfully submits that there is no necessity here that such a differential be maintained.

The Commission's policy with regard to such differentials is set forth in *Tobacco to Houston, Tex.*, 210 I.C.C. 284. It is there stated at page 287:

"With respect to the rate differential, while we have customarily authorized relief only in rates which made proper allowance for the *disadvantages of water service, if any*, the amount of the differential depends en- [fol. 374] tirely upon the circumstances of each case, and it is *not mandatory that any differential be* imposed, provided the rate authorized for the rail carriers be not lower than necessary to meet the competition."

Similarly in *Billets from Ohio and Kentucky to New Bedford, Mass.*, 298 I.C.C. 796 this Commission, referring to the opinions of the Supreme Court in *Dixie Carriers, Inc. v. United States*, 351 U.S. 56 and *Interstate Commerce Commission* v. *Mechling, supra* says of the necessity for a differential at pages 799-800:

"The two decisions of the Supreme Court referred to assume that there are inherent advantages in barge transportation, as distinguished from rail transportation, in that the former is less costly than the latter. In a number of cases this Commission has indulged in a like assumption. Here, however, the comparison is not between a rail route and a barge route as such, but between a rail route and a truck-barge-rail route. Whether the actual cost of transportation over the latter route is in fact less than over the all-rail route is not supported by any evidence on this record, and may not be assumed by us merely because barges are used for a part of the service. If the operating cost over the truck-barge-rail route is less than that over the all-rail route, that fact should be susceptible of proof. As stated, no such proof was offered.

"There being no evidence to warrant a finding that the truck-barge-rail route has any inherent advantages that would entitle it to lower rates than the all-rail route, we feel obliged not to require a barge differential under the rail rates. This conclusion is further supported by the clear and positive testimony of the shipper's traffic manager that inasmuch as the shipper must bear the difference between the rate from Steelton and that from the lowest rated competitive point, an

all-rail higher than the aggregate over the truck-barge-rail rate would not move any traffic. Similarly, under the proposed rate, which is the same as the rate over the competing route, some of the traffic would move all-rail and some would move over the truck-barge-rail [fol. 375] route. That testimony is not rebutted by general statements to the effect that barge rates the same as rail rates have failed to attract traffic, for there is no specific showing that the latter results have occurred under circumstances similar to those now before us.

"Carriers are at liberty to initiate such rates as they choose, and we may not interfere unless it appears that such rates violate some provision of the act, interpreted in the light of the national transportation policy. Where, as here, the proposed rates are on a level that is reasonably related to the level of rates from competitive origins the earnings produced thereby leave no doubt of their compensatory nature, and the evidence is definite that the rates would afford a fair and equal opportunity to both the respondents and the protestants to compete for the traffic without sacrificing any inherent advantages of either mode of transportation, we feel called upon not to interfere with the managerial discretion of the respondents.

"We find that the proposed rates are just and reasonable. An order discontinuing the proceeding will be entered."

If there are inherent advantages in the barge service which come into play in the involved movement, and the Chicago barge receipts for the first 6 months of 1957 would seem to refute any such assumption, respondent urges that since the 5½ cent proportional rate is 119 percent of the average published barge rate from the river elevators those disadvantages are allowed for in the proportional rate.

VIII.

The Law Does Not Require the Preservation of Chicago's Position as a Middleman.

On movements of corn from the involved river elevators through Chicago to the processor in Kankakee on respond-[fol. 376] ent's line, Chicago is in the position of a middleman. Respondent does not deny that Chicago grain warehousemen have a financial interest in having the northern Illinois corn stored in their elevators, however, that interest alone cannot govern the level of the rates applying between two points as far removed from Chicago as Moronts and Kankakee. The interest of the public, the country elevator operators and the corn processors in more economic transportation, is the controlling interest in this instance.

Thus, in *Transit and Mixing Rules on Foodstuffs*, 270 I.C.C. 157, the Commission found as follows at page 175:

> "It is not the province of the Commission to determine the relative merits of different sales methods or by rate adjustments to perpetuate any particular system or sales pattern of distribution. Section 15(a) of the Act requires the Commission to give due consideration, among other things, 'to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service'. The interest of manufacturers and retailers are as much a part of 'the Public interest' as those of middlemen. The determination of whether the proposed tariffs are just and reasonable must be made on other grounds."

Subsequently, in *Transit on Foodstuffs at Toledo, Ohio*, 277 I.C.C. 689, the Commission stated at page 697:

> "As stated in the prior report, Page 175, 'It is not the province of the Commission to determine the relative merits of different sales methods or by rate adjustments to perpetuate any particular system or sales pattern of distribution. * * * The interests of manufacturers and retailers are as much a part of 'the

methods proposed to be employed by the corporation would aid the carriers in more efficient and economical use of their equipment and, we believe, would have a favorable revenue effect upon the participating carriers."

[fol. 377] Nor does the fact that Chicago is an interterritorial grain rate-break point alter the relationship of the involved interests. Respondent emphatically denies that the 5½ cent proportional rate operates to contravene the rate-break principle. It is submitted that here, where corn originates east of the Mississippi River on the line of an eastern railroad and is carried into and out of the processing point by an eastern railroad and the product carried to an eastern or central territory destination by an eastern railroad, the rate-break principle has no application.

IX.

Carriers' Section 5A Agreement Was Fully Complied With in Publishing Proposed Rates.

It is alleged that in publishing Supplement 126 to New York Central Tariff No. 701-A the carriers' Section 5a Agreement was violated. Respondent submits the following paragraphs in refutation of that allegation.

With respect to the allegation that respondent has violated the Section 5a Agreement we wish to call attention to Part 2 of the Traffic Bulletin dated June 23, 1956 which listed the following:

> IRC 503-195—CORN, CL, min. wt. 100,000 lbs., from W. Kankakee, Union, Hill, Reddick, Blair, Dwight, Sunbury, Budd, Missal, Streator, Milla, Lostant, Priscilla, McNabb, Granville and Moronts, Ill. to Kankakee, Ill. —Prp.: 5½ per cwt., including X-196 inc.

This notification was made pursuant to the interterritorial agreement of Section 5a. The docket outlined above, copy of which is attached, Ex. No. 3 indicates the proposed rate is in no way encumbered by restriction on the ultimate destination of the milled product. The Proposal was con-

sidered by the I.F.A. executive committee at its meeting [fol. 378] on July 25, 1956, and was approved. Not one of the protestants availed itself of the opportunity of appearing before the committee to express its views on the proposed adjustment. Respondent cannot conceive of such lack of interest on the part of a group which one year later exhibits such militant opposition to the granting of the relief petition.

All interterritorial rate adjustments are subject to concurrence of other rate jurisdictions. The Section 5a Agreement does not require further hearings in addition to that offered before the initial rate committee. Therefore, contentions that Section 5a Agreement was violated are unfounded inasmuch as shippers have had every opportunity to exercise their prerogative when the proposal was originally bulletined for consideration before the initial rate committee.

Assuming for purposes of argument only that the carriers' Section 5a agreement was breached by the publication of Supplement 126, such violation could have no bearing upon the legality of the rates therein. The tariff was published in strict compliance with Section 6 of the Act and hence the rates therein provided are the legally applicable rates. The sole effect of such an infraction would be to subject respondent to prosecution under the Anti-Trust Law.

X.

The Presently Effective 5½ Cent Proportional Rate Is Just and Reasonable and Should Not Be Summarily Cancelled.

The 5½ cent proportional rate as it applies, in conjunction with reshipping rates, on corn and corn products moving to the East has been shown to be highly remunerative [fol. 379] and compensatory. Furthermore, said rate has been shown to be no lower than necessary to meet the barge competition. In short, the rate has been demonstrated to be just and reasonable and an effective generator of traffic.

For these reasons alone, the 5½ cent proportional rate should not be summarily cancelled. However, an equally

important reason, and one which makes it imperative that the many requests for summary cancellation be denied, is that several of the operators of N.Y.C. country elevators, in reliance upon the 5½ cent rate as the published and legally applicable rate, have made substantial capital expenditures in readying their elevators to elevate and store the corn the 5½ cent rate has enabled them to purchase. If these operators are again forced to halt commercial elevation they will be deprived of the means of making themselves whole on their investments and will suffer an unrecoverable financial loss.

Certainly rates which have become the legally applicable rates by reason of publication in compliance with Section 6 should not be summarily cancelled on the strength of the unsworn, self-serving assertions contained in the numerous petitions filed by the protestants and petitioners.

XI.

The Interests of the Protestants and Petitioners.

The various interests seeming to motivate certain of the petitions for suspension and petitions in opposition to the sought Fourth Section relief are worthy of note.

The interest of the members of the Chicago Board of Trade as middlemen has previously been treated. The protest of Cargill, Inc., states alleged costs for barge transportation and includes therein a barge rate of 4.25 cents per hundred pounds. It is, however, respondent's information that Cargill owns and maintains its own barges. A question [fol. 380] arises therefore as to whether that protestant transports its own corn in its own barges and, if it does, whether the costs shown in the Cargill protest have any application to its own movements.

Another interest to be noted is that of the barge operators in assuring the rigid compliance of respondent with the provisions of the Interstate Commerce Act while they undoubtedly exempt their own movements of corn from the regulation of this Commission by taking advantage of Section 303(a). This being true, the extent to which the published barge rates are the rates under which the corn actu-

ally moves from the river elevators to Chicago is open to question.

Certain of the petitioners display an uncommon regard for the interests of others. For instance, several of the petitions charge that the 5½ cent proportional rate will harm other railroads serving the origin area and that millers in Akron and other cities will be injured. Be that as it may, the Supreme Court of the United States has clearly established by its opinions that the law "will not listen to a party who complains of a grievance which is not his." *Clark* v. *Kansas*, 176 U.S. 114, 118; *Smiley* v. *Kansas*, 196 U.S. 447; *Interstate Commerce Commission* v. *Chicago, R. I. & P. Ry.*, 218 U.S. 88, 109.

Conclusion.

The rates brought in issue by the protests and petitions for suspension merely extend the destination territory to which identical rates presently apply. Respondent has shown the benefits which have already derived from the presently effective rates to the Kankakee Belt, the country elevators, Kankakee, Indianapolis, etc. It is submitted that the application of said rates to Central Territory will prove equally beneficial.

[fol. 381] In order that both the proposed and presently effective rates may comply with Section 4 of the Act, respondent filed its Fourth Section application I.C.C. No. 33955, as amended. The relief from the provisions of the long-and-short haul clause therein requested is opposed by numerous petitioners. No one of said petitioners is a shipper situated in a city which will, because of the involved rates, take a higher rate than a city beyond. Respondent has shown its dire need for the rates here involved as well as the importance of said rates to shippers and receivers on its line. It is submitted that a special case has been made out for the relief requested.

Wherefore, respondent and applicant respectfully requests that the proposed rates be permitted to become effective on August 29, 1957, as scheduled, that the relief sought in Fourth Section application I.C.C. No. 33955 be granted

and that the requests for summary cancellation of the rat
presently applicable be denied.

Respectfully submitted,

William C. Leiper, 1225 LaSalle Street Station, Ch
cago 5, Illinois.

Dated: July 30, 1957.

Certificate of service (omitted in printing).

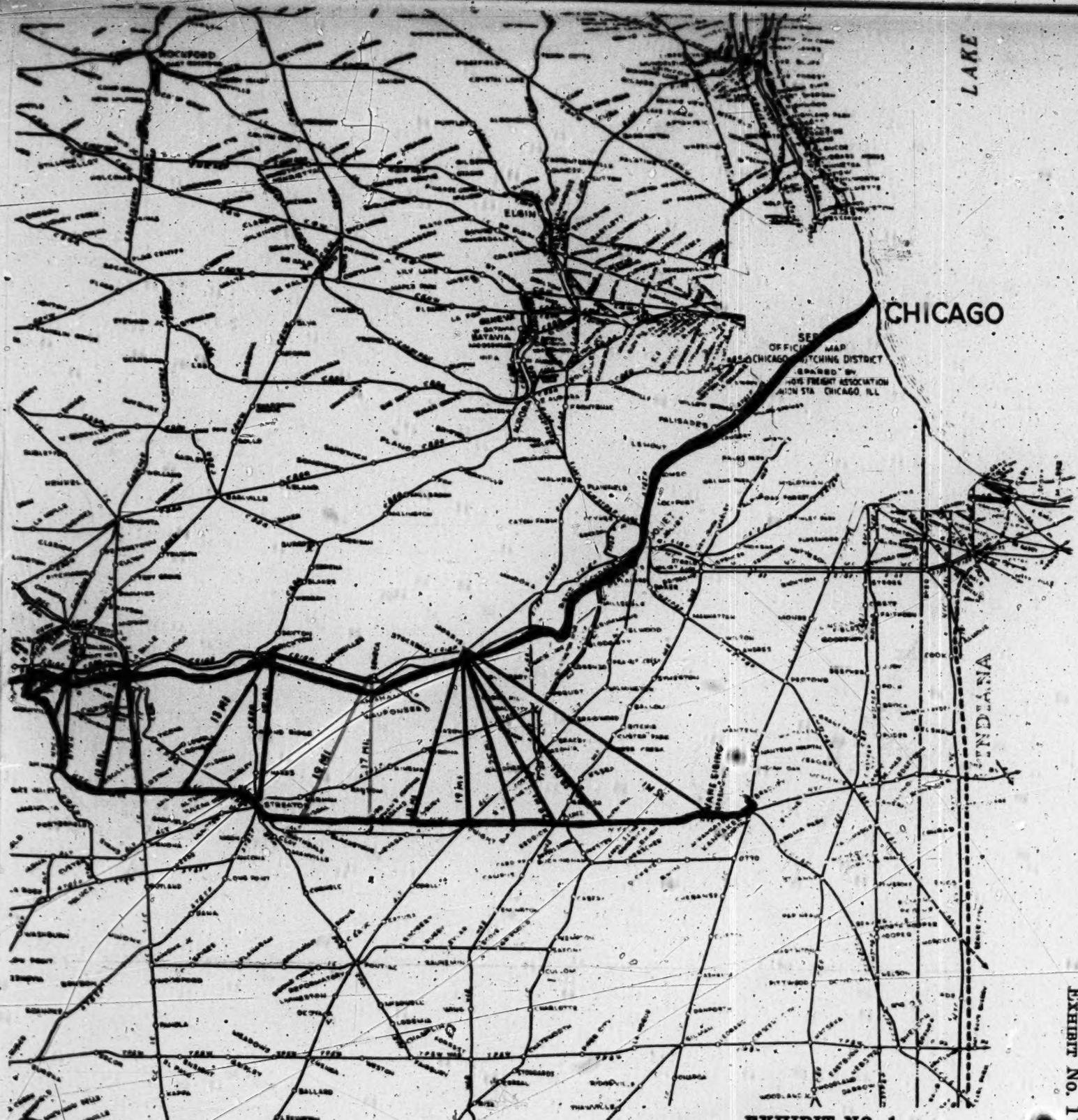


EXHIBIT NO. 1

MAP I -
Map of Northern Illinois outlining N.Y.C.R.R. and Illinois Waterways together with approximate highway distances between railroad stations and and nearest river terminal elevators.

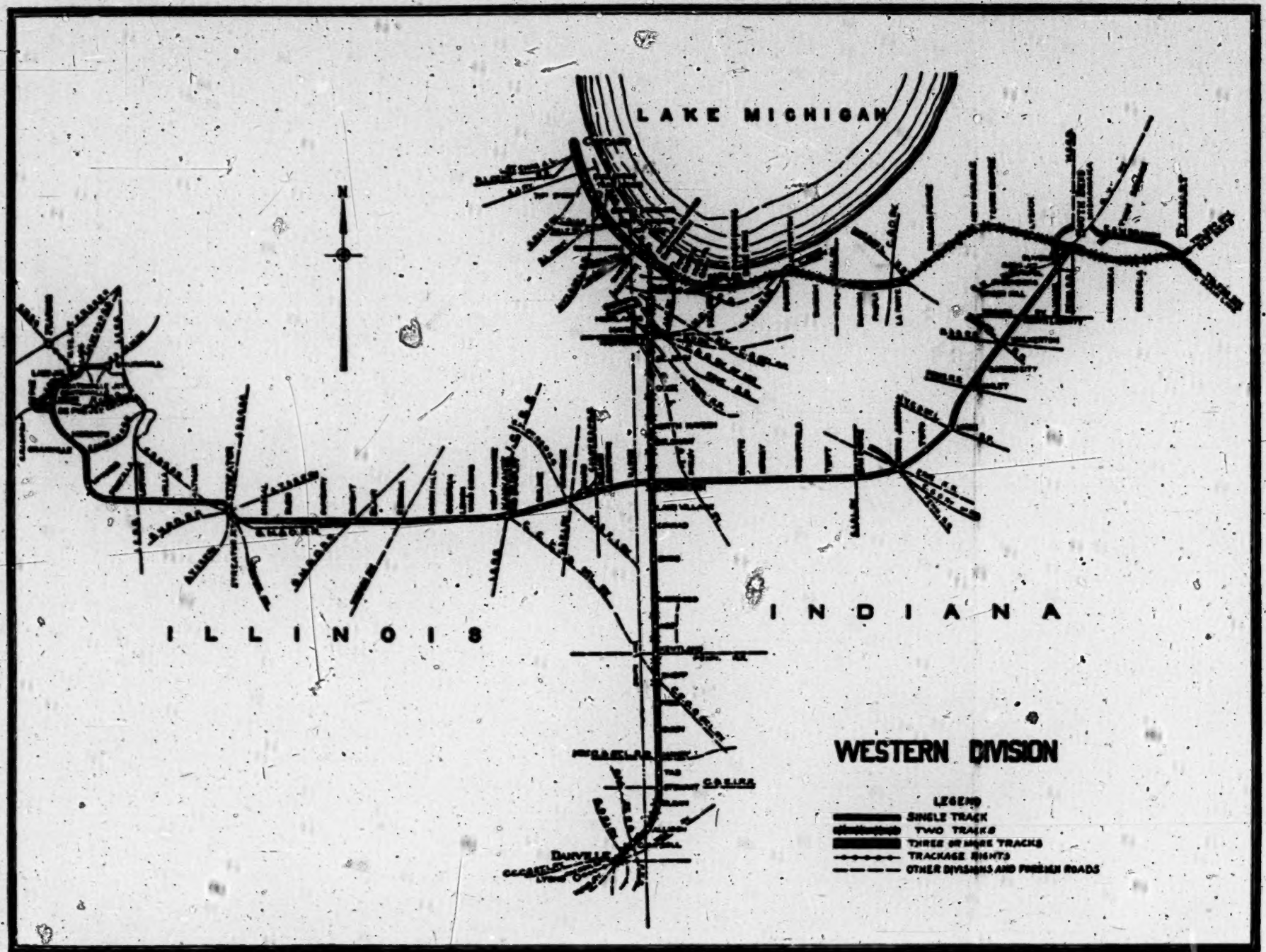
[fol. 382]

EXHIBIT No. 1

[fol. 383]

EXHIBIT No. 2

(See opposite) ☞


LAKE MICHIGAN
N
ILLINOIS
INDIANA
WESTERN DIVISION
LEGEND
SINGLE TRACK
TWO TRACKS
THREE OR MORE TRACKS
TRACKAGE RIGHTS
OTHER DIVISIONS AND FOREIGN ROADS

[fol. 384]

EXHIBIT No. 3

Illinois Freight Association Application I.R.C. D-503-195, dated June 18, 1956 omitted from the record here. Printed at page 200.

[fol. 386a]

BEFORE THE INTERSTATE COMMERCE COMMISSION

RENEWAL OF REQUEST OF A. L. MECHLING BARGE LINES INC. TO REQUIRE FORTHWITH TERMINATION OF ADMITTED VIOLATIONS OF SECTION 4(1) OF THE INTERSTATE COMMERCE ACT—Filed August 1, 1957

The purpose of this communication is to call to the Commission's attention, again, that the New York Central Railroad under its Tariff 701-A and Supplement 122 thereof, in combination with its eastern connections under Agent H. R. Hinsch's Tariffs 245-H and 535-C, I.C.C. Nos. 4403, and 4499, is charging and collecting rates which are a departure from the 4th Section of the statute without any authority of this Commission, and the requests that have heretofore been made to the Commission by numerous parties that an order be entered requiring said railroads to cease and desist from this violation of the law.

The fact that the rates in question are departures from the 4th Section and the further fact that they have not been authorized by this Commission, are admitted by the New York Central and its eastern connections by their application, as amended, in F.S.A. 33955, wherein they request *in futuro* the Commission's approval of such departures.

In its said application, as amended, the Traffic Executive Committee for the Eastern Trunk Line Railroads of which [fol. 386b] the New York Central is a member states as follows:

> "When the 5½-cent proportional rate referred to herein to Kankakee, as published in NYC Tariff 701-A, ICC No. 1169, is added to the reshipping rates appli-

rable from Kaukakee, which are the same as from Chicago, to the involved destination territory published in Agent H. R. Hinsch's Tariffs 535-C, ICC No. 4499 and 245-H, ICC No. 4403, they produce through combination rates which are lower than the local or flat rates applicable from Kankakee and stations east, north and south thereof located along routes of eastern lines to the extent that they participate in the involved tariffs to points in the destination territory referred to, in which instances, unauthorized departures occur due to higher local rates from intermediate points, and additional relief appears necessary."

Said application for 4th Section relief with respect to said departure rates, thus admittedly put into effect by the New York Central and its connecting railroads without securing any authority therefor from this Commission, the protest of the undersigned A. L. Mechling Barge Lines Inc., and the petition of the undersigned Waterways Freight Bureau are hereby referred to, and the averments of said protest and petition are made a part hereof.

Said barge line, and all the other barge line members of the Waterways Freight Bureau engaged in the transportation of corn to Chicago via the Illinois Waterway, are suffering irreparable injury by the illegal maintenance of said rates by the New York Central Railroad, which becomes [fol. 386c] progressively greater as the shipping public becomes more widely cognizant of the existence of such illegal rates.

The undersigned respectfully calls the Commission's attention to the provisions of Section 12(1) of the Interstate Commerce Act and especially the third sentence thereof, authorizing and requiring the Commission to execute and enforce the provisions of the Interstate Commerce Act, and further to the provisions of Section 15(1) of the Interstate Commerce Act, and especially its provision authorizing this Commission to order that carrier or carriers shall cease and desist from violations of the Interstate Commerce Act to the extent that they exist.

Said 4th Section application requests authority to maintain, after the Commission shall so order, the said rates now illegally in effect, and also authority for the New York Central's tariff supplement making the same applicable to destinations in Central Territory, which supplement was published to become effective on July 30, 1957. On that date the Commission advised the undersigned barge line that the effective date of said supplement had been postponed to August 29, 1957, but that the Commission had no information as to whether or not any of the rates would be withdrawn, even though said rates were by admission, as aforesaid, being maintained, in violation of law, to Eastern Trunk Line and New England Territory.

[fol. 386d] The undersigned respectfully direct the Commission's attention to the fact that there is no procedure available to them under the Commission's rules which can be completed in less than sixty days to bring about the withdrawal of said unlawful published rates, except the action of this Commission (heretofore requested) under Sections 12(1) and 15(1) to require the withdrawal of said illegal rates, which last is accordingly the only administrative remedy which the undersigned have for the irreparable injury they presently suffer from said admittedly illegal rates, and further that the violation of the Interstate Commerce Act by the maintenance of said illegal rates to Eastern Trunk Line and New England Territory is now fully admitted by the publishing railroads in their pending request to the Commission that it grant relief that will render such rates legal for exaction on future traffic that may be carried after the Commission grants such relief (if the Commission should decide on hearing that such relief from the Act would be warranted).

The facts as stated herein stand formally admitted in the Commission's records, as aforesaid, and the illegality of said rates, as presently published and exacted, is thus admitted.

Accordingly, the undersigned again requests the Commission to require the withdrawal of said illegal rates, [fol. 386e] whose present exaction pending the consideration of the said railroads' request for authority to exact

them, cannot under the law be retroactively validated by any order which the Commission may hereafter enter.

July 31, 1957, at Chicago, Illinois.

Respectfully submitted,

A. L. Mechling Barge Lines, Inc.; By: Edward B. Hayes, Registered Practitioner, 135 South LaSalle St., Chicago, Illinois.

Waterways Freight Bureau; By: Wesley A. Rogers, Chairman and Registered Practitioner, 28 East Jackson Blvd., Chicago 4, Illinois.

Certificate of service (omitted in printing).

[fol. 387]

BEFORE THE INTERSTATE COMMERCE COMMISSION

REPLY OF GENERAL FOODS CORPORATION DATED AUGUST 6, 1957 TO SECOND PROTEST OF MECHLING BARGE LINES AND WATERWAYS FREIGHT BUREAU DATED JULY 31, 1957 IN F.S.A. 33955

Mr. H. D. McCoy, Secretary
Interstate Commerce Commission
I.C.C. Building
Washington 25, D. C.

Dear Mr. McCoy:

On July 31, Edward B. Hayes, in behalf of the A. L. Mechling Barge Lines, Inc. and Waterways Freight Bureau, filed a supplemental communication with the Commission in the above proceeding.

The allegations fall into two classes:

1. (Page 2) Protestants allege they "*are* suffering irreparable injury by the illegal maintenance of said

rates by the New York Central Railroad, which becomes progressively greater as the shipping public becomes more widely cognizant of the existence of such illegal rates." Again on Page 4 protestant avers that "they *presently* suffer" from the publication of the 5½ cent rail rate.

2. They allege a departure from the Fourth Section without authority from the Commission.

[fol. 388] With respect to allegation 1: This is merely an unsupported statement and in direct conflict with the facts as portrayed in our statement of reply dated July 29, 1957, showing that Barge receipts of Corn at Chicago increased over 3,000,000 bushels during the first six months of 1957, when the 5½ cent rate was in effect versus the first six months of 1956.

This allegation is obviously designed to leave the impression of great harm where actually none exists. We respectfully submit exaggerated statements of this type with no supporting evidence whatever be dismissed from consideration by the Commission.

As to allegation 2: We believe the New York Central Railroad has adequately replied to the question of Fourth Section relief.

Applications for relief from the Fourth Section are generally contested by industry intermediate between the origin and destination territories.

There are no such protestants in this proceeding. Why not? Because no new low transportation costs from the origin to the destination territory are involved. To the contrary, the all rail combination produces a higher through rate factor than does Barge rail. For example, Barge rail to New York is 4¼ cents plus 52 cents or 56¼ cents per cwt. through versus all rail of 5½ cents plus 52 cents or 57½ cents through.

[fol. 389] This higher rail combination does not invoke hardships by virtue of Section 4, that have not existed since the application of the reshipping rate to Barge Grain some 19 years ago.

As a matter of fact, anyone alleging harm by virtue of deviations from the Fourth Section would quite probably have claimed such harm when the Supreme Court decided in 1947 that Barge arrival Corn was entitled to rail reshipping rates from Chicago, which railroads had been applying as early as 1938.

Certainly the combination of Barge-rail factors produced lower through rates than were then, and are still today, in effect from points east of Chicago to the territory east thereof.

We believe the New York Central Railroad published this rate in absolute good faith, believing the combination of proportional rates required no additional relief. If any such relief is required for clarification then we respectfully request it be granted promptly. We believe, too, that we are supporting it in equally good faith. We hope the Commission will find that Congress did indeed intend equality of competitive opportunity for the railroads as well as competitive forms of transportation.

Sincerely yours,

Arthur C. Schier, Vice President-Traffic, 250 North Street, White Plains, N. Y.

Copies to all known parties of record.

[fol. 390]

Examiner's proposed report in I.C.C. Docket F.S.A. No. 33955 filed March 16, 1959 omitted from the record here. Printed at page 32.

[fol. 418]

Report of the Interstate Commerce Commission, Division 2 in Docket F.S.A. No. 33955, decided June 8, 1960 omitted from the record here. Printed at page 9.

[fol. 434]

I.C.C. Fourth Section Order No. 19346, dated June 8, 1960 omitted from the record here. Printed at page 29.

[fol. 435]

I.C.C. Order denying the petition for reconsideration and reargument dated November 18, 1960 omitted from the record here. Printed at page 31.

[fol. A]

Secretary's Certificate to foregoing transcript omitted in printing.

[fol. 1]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. F.S.A. No. 33955

In the Matter of:

CORN AND CORN PRODUCTS—
ILLINOIS TO OFFICIAL TERRITORY

Transcript of Hearing—Wednesday, January 29, 1958

Room 705, U. S. Custom House,
610 South Canal Street,
Chicago, Illinois.

Met, pursuant to notice, at 9:30 a.m.

Before:

GEORGE A. DAHAN, Examiner.

APPEARANCES:

Richard J. Murphy, William C. Leiper, and Daniel J. Sweeney, 1225 LaSalle Street Station, Chicago, Illinois, appearing for Applicants, New York Central Railroad, et al.;

Freeman Bradford, 712 Board of Trade, Indianapolis, Indiana, Appearing for Indianapolis Board of Trade on behalf of applicants;

Edward B. Hayes and Wilbur S. Legg, Suite 2500, 135 South LaSalle Street, Chicago, Illinois, appearing for A. L. Mechling Barge Lines, Emington Grain Company, Bookwalter Grain Company, Cullom Cooperative Grain Company, Dale P. Walsh, Charles Treasure, Griswold Grain Company, and Mazon Farmers Elevator, protestants;

[fol. 2] James V. Springrose, 1740 Field Building, Chicago, Illinois, appearing for Cargill, Inc., protestant;

Richard M. Freeman, One North LaSalle Street, Chicago, Illinois, appearing for Cargill, Inc., Illinois Grain Corporation, and Indiana Farm Bureau Cooperative Association, protestants;

R. D. Erickson and J. S. Chartrand, Suite 1074, 141 West Jackson Boulevard, Chicago, Illinois, appearing for Board of Trade of City of Chicago, protestant;

A. C. Schier, 250 North Street, White Plains, New York, appearing for General Foods Corporation, intervener in support of the application.

[fol. 4] PROCEEDINGS

Exam. Dahan: Come to order, please. There will be no smoking in this room at any time.

The Interstate Commerce Commission has set for hearing at this time and place Fourth Section Application No. 33955, Corn and Corn Products, Illinois to Official Territory.

In entering your appearance will you please give your name in full, your address, and the city, and indicate whether or not you have been admitted to practice before the Interstate Commerce Commission.

Who appears for the applicant?

Mr. Murphy: Richard J. Murphy, 1225 La Salle Street Station, Chicago, Illinois, appearing on behalf of the applicants.

There are other appearances on behalf of the applicant, your Honor.

Mr. Leiper: William C. Leiper, 1225 La Salle Street Station, Chicago, Illinois. I am appearing on behalf of the applicant. I am an attorney and licensed to practice before this Commission.

Mr. Sweeney: Daniel J. Sweeney, 1225 La Salle Street Station, Chicago, Illinois, appearing for the applicant, New York Central Railroad. I am admitted to practice before the Commission.

[fol. 5] Exam. Dahan: Are there any appearances in support of the applicant?

Mr. Bradford: Freeman Bradford, 712 Board of Trade, Indianapolis, Indiana. I am appearing for the Indianapolis Board of Trade, Evans Building Company.

I am an attorney at law and admitted to practice.

Mr. Schier: A. C. Schier, Vice-President, General Foods Corporation, White Plains, New York, appearing in behalf of General Foods Corporation, Corn Mill Division of Kankakee, Illinois, intervener in support of the applicant railroad.

I am not admitted to practice before the Commission.

Exam. Dahan: You are here as an officer of the corporation?

Mr. Schier: Yes.

Exam. Dahan: Who appears for protestants?

Mr. Hayes: Edward B. Hayes, Room 2500, Field Building, Chicago, appearing on behalf of the protestants, A. L. Mechling Barge Line, Inc., and I also appear on behalf of certain interveners who are protestants themselves, Emington Grain Company, Bookwalter Grain Company, Cullom Cooperative Grain Company, Dale P. Walsh, Charles Treasure, Griswold Grain Company, and the Mazon Farm-[fol. 6] ers Elevator.

I am an attorney at law and admitted to practice before the Commission.

Mr. Legg: Wilbur S. Legg, Suite 2500, 135 South La Salle Street, Chicago 3, Illinois, appearing on behalf of protestant A. L. Mechling Barge Line. I am an attorney at law and although I am not licensed to practice before the Interstate Commerce Commission, I would ask your indulgence for this proceeding. I have submitted an application which has not yet been acted upon, but I see no reason why it will not be.

Exam. Dahan: This is your first appearance in any proceeding before the Commission?

Mr. Legg: No, this is not the first; this is the second, Mr. Examiner.

Mr. Hayes: May I say, Mr. Examiner, on Mr. Legg's behalf, as he is too modest to say so, he was for many years on the staff of the Illinois Commerce Commission.

Exam. Dahan: You do have an application on file?

Mr. Legg: I have submitted an application, yes, Mr. Examiner.

Exam. Dahan: I will admit your appearance at this time but you will have to have an application acted upon before

you can appear again. Actually you are only allowed one time and this is your second.

[fol. 7] Mr. Freeman: Richard M. Freeman, One North La Salle Street, Chicago, Illinois, appearing on behalf of protestants Cargill, Illinois Grain Corporation and Indiana Farm Bureau Cooperative Association.

I am licensed to practice before the Interstate Commerce Commission.

Mr. Chartrand: J. S. Chartrand, representing the Board of Trade of City of Chicago, 141 West Jackson Boulevard, Chicago, Illinois.

I am a practitioner before the Interstate Commerce Commission.

Now with regard to statement of position, I did not fall in one category wholly nor in the other. It might be stated in this manner, that we are in sympathy with the applicants here, but there are facets of this case which we feel violate other sections of the Act which causes us for those reasons to be opposed to it.

Mr. Bradford: If the Examiner please, in stating my appearance I stated I was representing the Indianapolis Board of Trade, and I would like to say that is except for two members, Cargill, Incorporated and Indiana Grain Coop.

Mr. Erickson: My name is R. D. Erickson. I am assistant manager of the Board of Trade transportation department. I am a registered practitioner with this Commission. The [fol. 8] statements which were made by Mr. Chartrand equally apply with respect to me. I would ask the Examiner's abeyance in a matter. There are some country interests that are going to come up here at the earliest possible opportunity for them that desire to be heard in their own name and who have asked that I assist them at the time they are on the stand. When they come to file their appearance, I should then also care to appear in their behalf.

Mr. Springrose: James V. Springrose, Room 1740, 135 South La Salle Street, Chicago, Illinois, representing protestant Cargill, Inc.

I am a practitioner before the Interstate Commerce Commission, registered practitioner.

Exam. Dahan: Are there any other appearances?

(No response.)

Exam. Dahan: Is applicant ready to proceed?

Mr. Murphy: We are, sir.

I will call Mr. Joseph Tascik as our first witness.

JOSEPH R. TASCIK, was sworn and testified as follows:

Direct examination.

Mr. Murphy: Mr. Tascik has a series of approximately twenty exhibits and I wonder if it would be convenient to [fol. 9] identify them for the record prior to the time he commences his testimony?

Exam. Dahan: If that is what you prefer, we will do so now. Whatever you say.

Mr. Murphy: I believe it would be better if we do that, your Honor.

By Mr. Murphy:

Q. Will you state your name, position and address?

A. Joseph R. Tascik, Freight Sales Manager, New York Central Railroad Company, with headquarters in La Salle Street Station, Chicago, Illinois.

Q. What are your responsibilities?

A. The development of business for the New York Central. I also have the regional responsibility of setting the pricing of the transportation service.

Q. How long have you been employed by the New York Central in rate and traffic capacity?

A. 35 years.

Q. Are the New York Central Kankakee Belt stations involved in this proceeding under your jurisdiction?

A. Yes, they are.

Q. Are you familiar with Fourth Section Application No. 33955?

A. Yes.

Q. What is the subject of this application?

[fol. 10] A. Corn and corn products.

Mr. Murphy: Your Honor, Mr. Tascik has prepared a series of exhibits. May we have those marked for identification?

Exam. Dahan: Very well. Have they been distributed?

Mr. Murphy: They have been distributed.

The first exhibit that will be tendered by Mr. Tascik is a map.

Exam. Dahan: That will be marked for identification as Exhibit No. 1.

(Applicant's Exhibit No. 1, Wit. Tascik, marked for identification.)

Mr. Murphy: The second exhibit tendered by Mr. Tascik is marked with a letter B in the lower corner of the exhibit.

Exam. Dahan: It may be marked as Exhibit 2.

Discussion off the record.

(Discussion off the record.)

Exam. Dahan: They may be marked as Applicant's Exhibits 1 through 21.

(Applicant's Exhibits 1 through 21, Wit. Tascik, marked for identification.)

By Mr. Murphy:

Q. Mr. Tascik, were the exhibits that have been marked for identification as Exhibit Nos. 1 through 21 prepared [fol. 11] by you or under your supervision and direction?

A. Yes, sir.

Q. Are they true and correct to the best of your knowledge and belief?

A. They are.

Q. Mr. Tascik, are you familiar with the reasons why Fourth Section Application No. 33955 was filed?

A. Yes.

Q. Are you familiar with the justification for the application?

A. Yes.

Q. Please describe the origin territory involved in this proceeding.

A. My Exhibit No. 1 is a map of the New York Central Railroad indicating its Kankakee Belt Line operation and it will be observed the Kankakee Belt extends from Zearing, Illinois to South Bend, Indiana for a distance of 200 miles.

This railroad runs through typical rural territory and the section of the railroad west of Kankakee originates or terminates only an insignificant volume of manufactured and miscellaneous article traffic. The stations west of Kankakee up to and including Moronts, Illinois on the Kankakee Belt are the origin stations involved.

[fol. 12] The proximity of the Illinois River is shown on this exhibit and we have indicated and listed 10 river elevators, Lockport to Lacon, to show their relationship to the New York Central Railroad.

My Exhibit No. 2 shows the highway distances from stations on the New York Central west of Kankakee to logical barge ports that would be utilized in the trucking of corn from areas indicated served by the New York Central.

When corn originates on farms south of the New York Central, you will note from Exhibit 1 for example stations Van's Siding to Priscilla, the trucking distance to the river would be greater than indicated on the exhibit. On the other hand, if the corn originates north of the New York Central and the river, the trucking distance would depend upon the proximity of the farm to the river or railroad. Further illustrating, if the corn originates for example in an area south of McNab, it could move to the river at Hennepin, Henry or Lacon and the distance would here again depend on the proximity of the farm to the river or railroad.

Q. Mr. Tasčik, you referred to Van's Siding. Could you locate Van's Siding on your Exhibit No. 1, the map?

A. Van's Siding is the first station west of Kankakee.

Q. Is it shown?

[fol. 13] A. Or West Kankakee.

Q. Is it shown on the map, sir?

A. Yes, sir. I don't believe it is shown in your copy, but it is shown in all the others.

Q. Will you proceed with the answer to the question in describing the origin territory?

A. Until the time the New York Central made itself competitive by adjusting its rates, the preponderance of the corn, irrespective of whether the distance favored the railroad moved to the river. This stems from the fact that the rail rates were not competitive with the barge-rail route through Chicago, and it was more advantageous rate-wise to use the barge route as my subsequent exhibits will demonstrate.

Q. Please describe the destination territory involved in this application.

A. Official territory, which is the territory lying immediately east of Kankakee.

Q. Will you describe the rate application?

A. NYC Tariff 701-A, ICC 1169 coupled with circle reference 400 therein specifically provides that the 5½ cent rate applies only on corn and corn products, when milled-in-transit and only as proportional rate to Kankakee, Illinois, on traffic destined to Central territory, and to the Western [fol. 14] Termini of Eastern Trunk Lines and east thereof, as defined in Central Territory Railroads' Tariff 3-K, Agent H. R. Hinsch's Tariff ICC 4622. Minimum weight 100,000 pounds. Rates are subject to transit rules and regulations published in tariffs lawfully on file with the Interstate Commerce Commission.

Illustrating the tariff application described and using Kankakee as the transit station, the billing procedures are as follows:

The local grain rate from stations here involved to Kankakee is assessed on the corn in the first instance. After transit at Kankakee, the outbound reshipping corn product rate from Kankakee to destination is applied to the transited corn product, plus the 5½ cent proportional rate. These two rate factors constitute the through rate.

The inbound local rate to Kankakee, originally assessed, is credited to the outbound transaction. The net effect of this rate application is that the total rate will be the combination of the 5½ cent proportional rate to Kankakee and the reshipping rate from Kankakee to the ultimate destination.

The same would apply at Indianapolis, Paris, Danville, or any other transit point in Official territory.

[fol. 15] The reshipping rates from Chicago, Illinois and Kankakee to Official territory destinations are the same.

Q. Will you state the reasons why the New York Central reduced the rate on corn from the origins involved here?

A. Year after year we have seen the bountiful crops of corn produced in the territory contiguous to the Kankakee Belt west of Kankakee, Illinois move by barge into Chicago. Our rates were not even remotely competitive with the barge-rail route and after a study in 1956, we concluded that if we wanted a share of the corn movement it was necessary for us to establish a competitive rate.

Q. Have you prepared exhibits showing barge and rail movements of corn?

A. Yes, my Exhibit No. 3 is a statement showing barge shipments to Chicago via the Illinois Waterways. The movement of corn via the Illinois River in 1935 was less than three quarters of a million bushels, it increased to more than 34 million bushels in 1957. This movement of corn via the river during 1957 exceeded the movement in each of the four preceding years. The total barge shipments of all grain via the Illinois Waterways to Chicago increased from approximately one and a half million bushels in 1935 to [fol. 16] more than 59 million bushels in 1957 being the second highest year of record for barge receipts of grain at Chicago.

Q. Have you prepared exhibits showing origination of corn by rail from New York Central stations in the origin area, that is, Van's Siding to Moronts, Illinois?

A. Yes, I have. My Exhibit No. 4 is a statement showing the number of carloads of corn originated by the New York Central at its stations west of Kankakee for the years 1954 through 1956.

This corn movement for the most part was Government grain moving under C.C.C. programs for export. While this corn moved initially into Chicago for storage, that is, a part of it, it was subsequently exported through North Atlantic Ports on the basis of the through export rates from the country origins located west of Kankakee, Illinois, and

which rates are applicable through Chicago. This corn movements was on export rates which are substantially lower than the domestic rates applying from this area to North Atlantic Ports.

The preponderance of the grain traffic originating at these stations is corn; but to show the complete grain movement my Exhibit No. 5 shows the origination of all grain [fol. 17] including corn from these stations during the years 1950 through 1956.

Q. Mr. Tasčik, would it be possible to determine the amount of grain other than corn originated in the origin territory for the years 1954, '55 and '56 by subtracting the total shown on Exhibit No. 4 from the total shown on Exhibit No. 5 for those years?

A. Yes. The movement of grains other than corn in 1954 was 162 cars; 1955, 196 cars; and in 1956, 151 cars.

Q. Thank you.

Will you continue?

What other traffic originates in this territory?

A. The territory served by the line of the New York Central west of Kankakee is primarily an agricultural area. Aside from a quarry at Lehigh, a sand pit at Van's Siding, Illinois, and a few industries at Streator, Illinois, the only business available to the New York Central from the West End stations is grain traffic.

Q. Do you have a series of exhibits showing the rate situation as it was at the time you were studying the situation in 1956?

A. Yes, my Exhibit No. 6 is a statement showing rates on grain and grain products from New York Central destinations in Official territory as of July 10, 1956. The grain and grain products rates on page 1 of this exhibit to Trunk [fol. 18] Line territory are single factor rates published in CTR Tariff 245-H and the rates on page 2 of this exhibit to Buffalo and Pittsburgh are likewise single factor rates published in NYC Tariff 701-A.

To interior destinations in Central territory on page 2, the grain rates are based on combinations over Kankakee, Illinois, reflecting the local rates to Kankakee, as provided in NYC Tariff 701-A and the reshipping or proportional

rate applying beyond Kankakee as provided in CTR 535-C. The grain products rates are published as single factor rates in WTL Tariff 68-R.

My Exhibit 7 shows the barge rates and the movement of corn from Illinois River elevators to Chicago, Illinois for period December 15, 1956 to November 11, 1957. It will be observed from the exhibit that the average weighted barge rates is .04625 cents, just slightly over 4½ cents.

Q. Mr. Tascik, has there been any change in the barge rates recently?

A. Yes. On December 6, 1957 the barge rates were increased approximately two-tenths of a cent per hundred pounds.

Of course, the rail rate was increased five cents under 206 making it 5½ cents.

Q. You mean a half cent under 206?

[fol. 19] A. A half a cent under 206, and it will be increased another half cent under X 212, which will make the rate 6 cents.

Q. Will you describe your next exhibit, sir?

A. My next Exhibit, No. 8, shows what the barge-rail rates were to representative destinations in Official territory as of July 10, 1956. The rates in this exhibit reflect the .04625 cent barge factor to Chicago plus the published reshipping rates beyond Chicago as of July 10, 1956.

My Exhibit No. 9 is a comparison of the all-rail rates versus the barge-rail combination over Chicago, as of July 10, 1956. It will be noted from this comparison that the rates as of July 10, 1956 favored the rail-barge route from approximately 8 to 18 cents per cwt.

Q. Did you discuss this competitive situation with shippers on the New York Central?

A. Yes, in the course of our study we made inquiries of elevator operators or owners on th New York Central and of transit operators at Kankakee, Danville, Indianapolis and Paris.

Q. What conclusion was reached as a result of this investigation of the competitive situation?

A. It was concluded that the only way to meet the barge [fol. 20] competition was by meeting like with like, that is

by establishing a proportional rate for application with the reshipping rate in the same way the barge rates apply with the reshipping rates.

I want to make it clear the rail reshipping rates on corn and corn products from both Chicago and Kankakee are the same and we published a proportional rate to Kankakee that would make us competitive with the barge rate to Chicago, and the proportional 5 cent rate to Kankakee we published effective December 15, 1956 was in excess of the barge rates. Currently the proportional rate is 5½ cents.

Q. What action was taken?

A. After progressing the matter through the rate committees the 5 cent proportional rate was filed to become effective December 15, 1956 applicable on corn milled-in-transit destined to the Western Termini of Eastern Trunk Lines and East thereof.

Q. Brior to the filing of that tariff that was effective on December 16, 1956, was any consideration given to the necessity for obtaining Fourth Section relief?

A. Yes, originally we contemplated seeking Fourth Section relief simultaneously with the publication of the 5 cent corn rate restricted to apply to Trunk Line territory, but [fol. 21] after review of the outstanding Fourth Section Orders that apply in connection with the Chicago and Kankakee reshipping rates, it was concluded that the relief was already available under those orders.

The reshipping rates from Kankakee and Chicago are the same and the rates via both Kankakee and Chicago are subject to the identical provision of the same Fourth Section Order of the Commission, which is Fourth Section Order 18407. It was concluded that if relief existed via the barge-rail route it also existed via the all-rail route. For many years the combination of the barge-rail rates from the Illinois River area via Chicago have been less than the local rate from Chicago and from Indiana origins to eastern destinations.

Q. Then you mean there are departures in connection with the barge-rail rates?

A. Yes.

Q. Will you continue, please?

A. Subsequently a controversy arose as to whether or not the relief in effect was sufficient. It was also brought to our attention that the publication of the proportional rate for application on shipments to Trunk Line territory created departures to CFA destinations. To obviate the destination situation and to dispose of the controversy, it was concluded to extend the application of the proportional [fol. 22] rate to Central territory; this was accomplished effective August 29, 1957 by publication in Supplement No. 126 to NYC Tariff 701-A, and at the same time we filed Fourth Section Application No. 33955.

Q. Do you have an exhibit showing the present rail combination compared with the barge-rail combination?

A. Well,—

Q. That is, from this origin territory to Eastern destinations?

A. My Exhibit 10 compares the present charges rail versus the barge-rail from origins on the Kankakee Belt west of Kankakee and competitive river ports to representative destinations in Official territory. This exhibit shows that the proportional rate of 5½ cents to Kankakee, as in existence on December 1, 1957 produces rail charges ⅞ of a cent higher than barge-rail charges. In each instance the combination of the barge-rail rate or the all-rail rate is less than the local rates from Kankakee to destinations in the east.

Q. Mr. Tascik, your exhibit shows a weighted average barge rate of 4.625.

Will you discuss what changes have taken place in that rate?

A. Effective December 8th, this weighted average barge rate would approximate .04825. The barge rates reflect [fol. 23] about an approximate two-tenths of a cent per hundred increase.

When the proportional rate was originally published on December 15, 1956, it was 5 cents per hundred pounds reflecting 108% of the weighted average barge rate; under Ex Parte 206 it was increased to 5½ cents, which is 119% of the weighted average barge rate.

Q. As increased under Ex Parte 212, what percentage of the weighted average barge rate will that rate be of the new increased barge rates?

A. As I have stated, the barge rate was increased on December 6 approximately two-tenths of a cent per hundred pounds.

Our rate of 6 cents as proposed under X 212 will be 125% of the new barge rate.

Q. Do you have an exhibit showing the effect of the establishment of the proportional rate on corn products to C.F.A. destinations when transited at Kankakee?

A. Yes, my Exhibit No. 11 shows to representative destinations in Central territory the present through rates on corn products contrasted with the combination of the proportional rate to Kankakee, plus the reshipping rate beyond.

It will be observed the difference between the through rates and the combination results in reduction of ½ tp 8 [fol. 24] cents under the through rates.

The local rate, for example from Moronts, Illinois to Kankakee is 25 cents. It would naturally appear we were making a 19½ cent reduction in the rate; this, however, is not true as the through rates on grain products are lower than the combination of the local rates to Kankakee plus the reshipping rate beyond. This demonstrates that even prior to our adjustment local rates to Kankakee were not observed on corn products when the destination of the milled product was in Central territory.

Q. Mr. Tascik, will you describe what has been marked for identification as Exhibit No. 12?

A. My Exhibit No. 12 is a companion exhibit to the one that has just been introduced, that is, Exhibit No. 11, and Exhibit No. 11 shows what the situation would be at Kankakee under Agent Hinsch's applicable Tariff 413-T. The same rate situation would prevail if the transit took place at Danville, or any other point in Central territory where the transit application would be under the provisions of NYC Transit Tariff 10706-B.

I merely bring this out to show that the same rate situation would exist whether the transit application was under the provisions of the agency issue or individual lines' tariff.

[fol. 25] Q. What are the distances from these involved origin stations to Kankakee?

A. My Exhibit No. 13 shows the weighted average distance of the movements to Kankakee is 38.3 miles.

Q. What earnings do you receive on this rate per car and per car mile?

A. The weight of the corn to Kankakee runs approximately 110,000 pounds per car, producing revenue of $60.50 per car, yielding earnings of $1.58 per mile, per car mile. This represents additional revenue to the New York Central, which is in addition to the reshipping rate from Kankakee; as explained before, the reshipping rates from Chicago and Kankakee are the same and the Chicago reshipping rate applies via Kankakee.

Q. What is the rate application on ex-barge corn moving from Chicago to Kankakee for transit?

A. Ex-barge corn can be milled at Kankakee on basis of applying the Chicago reshipping rate. For example, the reshipping rate from Chicago to New York—and from Kankakee, too—is 54 cents, and this is the rate assessed on ex-barge corn Chicago to New York via Kankakee for milling.

The tariff mechanics are that the movement from Chicago to Kankakee is at a billing rate of 6½ cents per cwt., published in Tariff 701-A, ICC 1169, and on reshipment of the [fol. 26] milled product to New York 6½ cents is credited to this Chicago reshipping rate of 54 cents, resulting in a balance from Kankakee of 47½ cents per cwt.

Prior to the effectiveness, December 15, 1956, of the 5 cent rate on corn from our West End Stations to Kankakee, corn grown in the area contiguous to our West End Division could move by barge through Chicago via Kankakee at substantially lower charges than available for the rail movement from the involved territory through Kankakee, and this was due to the fact the barge rates to Chicago were lower than the rail rates to Kankakee.

Q. Mr. Tascik, you referred to a Chicago reshipping rate of 54 cents. To what destination does that rate apply?

A. To New York City or the New York rate basing point.

Q. You have described this routing. Do you consider such routing to be wasteful transportation, Mr. Tascik?

A. Yes. When corn grown in our backyard moves to River elevators and then is barged to Chicago and shipped by rail back to Kankakee for a distance of 75 miles rather than a rail movement from the producing area of 39 miles is wasteful transportation.

Q. Mr. Tascik, could you refer to Exhibit No. 1 and ex- [fol. 27] plain that statement by referring to the stations and lines of railroad and the River on Exhibit No. 1?

A. It will be observed from Exhibit No. 1 that the River parallels the New York Central West End stations and this corn would move by river into Chicago.

Chicago has the benefit of the reshipping rate when it moves through Kankakee. The movement would be from Chicago to Indiana Harbor down to Schneider, and from Schneider to Kankakee, a distance of 75 miles—I think it is 75 miles via the New York Central.

Now in contrast, this corn that moves by the River is drawn in great preponderance or in some preponderance from farms contiguous to stations on the New York Central Railroad.

Now if you look at this map from Union Hill to Kankakee as I have shown in my Exhibit 13, we have a haul of 14 miles contrasted to one of 75 miles from Chicago.

Similarly you have the same picture on every one of the stations from Kankakee to Moronts, Illinois, and based on our study of the traffic that has moved under our proportional rate, the weighted average distance of our movements is 38.3 miles.

So I think that demonstrates in itself that if we can handle this corn via Kankakee rather than let it move up [fol. 28] by barge to Chicago and then rail at Kankakee, that there is some wasteful transportation involved.

Q. Do you have an exhibit showing switching absorptions at Chicago by the New York Central on corn moved from Chicago to Kankakee for milling in transit?

A. Yes, my Exhibit No. 14 is a statement showing switching absorptions on this traffic. Based on the present absorption, the average per car absorption is $23.10. The average absorption per 100 pounds is slightly in excess of two cents. As I pointed out before, on the traffic moving from West End stations to Kankakee, we receive 5½ cents more than

we would receive if we handled ex-barge corn from Chicago to Kankakee. When you consider absorption of approximately 2 cents per 100 pounds coupled with the 5½ cent rate, the arrangement produces 7½ cents which is the amount of additional net revenue the New York Central realized by handling the traffic on the proportional rate.

This added net revenue to the New York Central amounts to between $80 and $85 per car over what would accrue to the New York Central on corn moving from Chicago on reshipping rates for transit and milling at Kankakee, Paris, Danville and Indianapolis for subsequent movement east [fol. 29] thereof. Thus by establishing a competitive rate the New York Central nets 7½ cents per 100 pounds of additional revenue and handles the car for but 39 miles as compared with the 75 miles from Chicago.

These factors were given important consideration in our determination to establish the proportional rate.

Q. Do you have an exhibit comparing rail distances from Chicago via Kankakee with rail distance from West End stations via Kankakee to representative eastern destinations?

A. Yes, my Exhibit No. 15 shows that the mileage from Chicago exceeds the distance from our West End stations via Kankakee from 3.73% to 20.61%.

Q. Do you have an exhibit showing what the percentages of the rates from Chicago and from the West End stations are of the Docket 28300 first class rates?

A. Yes. This is shown in my next Exhibit No. 16. It will be noted the through rates from the West End stations via Kankakee using the combination of the proportional rate to Kankakee and the reshipping rate related percentage-wise to the 28300 scale reflects a higher level than obtains from Chicago.

Q. Mr. Tascik, are there rates from West End stations that produce lower earnings than the combination we have [fol. 30] established by virtue of this 5½ cent proportional rate?

A. Yes. For example, from Dwight to New York, New York, the combination is 59.5 cents, and to Boston, the combination is 61.5 cents.

There are export rates to New York and Boston of 54.5 cents, from these same stations.

We get 5 cents more on our combination to New York and 7 cents more on our combination to Boston than we get on Export traffic from Dwight to these ports.

Q. Is that 5 cents a hundred pounds and 7 cents a hundred pounds?

A. Yes.

Q. Do you have an exhibit showing the percentages of first class reflected by the at and east rates from Buffalo, New York, Erie, Pennsylvania and Oswego, New York?

A. Yes, my Exhibit No. 17 shows that the at and east rates range from 6.3 per cent to 9.5 per cent of the Docket 28300 first class rates. Our rates resulting from the proportional rate application at Kankakee, as borne out by my Exhibit 16 range from 12.3 to 17.9 per cent, reflecting a substantially higher level than the at and east rates which were approved by the Commission in proceeding covering [fol. 31] export grain-ex-lake from Buffalo to New York 292 ICC No. 647.

Q. Do you have an exhibit showing the grain rate to Port Cargill, Minnesota?

A. My Exhibit 18 is a statement comparing earnings under the New York Central 5½ cent proportional rate with the earnings under the 6 cent rate published by the Minnesota and Western Railway from Winsted, Minnesota to Port Cargill, Minnesota. The Minnesota and Western, in order to meet truck competition, established a 6 cent per hundred pound weight rate on shelled corn and other grain from Winsted to Port Cargill. This rate produces earnings of $60 per car, based on loading of 100,000 pounds per car.

The distance via which the rate applies is 59 miles. The per car mile earnings are $1.017. In contrast, the New York Central, on its proportional rate of 5½ cents based on a loading of 100,000 pounds earns $55 per car, although our loadings aggregate in excess of 110,000 pounds.

On the weighted average distance of 38.3 miles from the origin stations involved to Kankakee, the 5½ cent rate on 100,000 pound load produces earnings of $1.436 per car mile and on a 110,000 pound load produces earnings of

$1.436 per car mile and on a 110,000 pound load produces earnings of $1.58 per car mile. The per ton mile earnings [fol. 32] from the New York Central's proportional rate for the weighted average distance of 38.3 miles is 28.7 mills, while the per ton mile earnings from the Minnesota and Western's rate from Winsted to Port Cargill amounts to 20.3 mills.

Q. Please refer to your exhibits showing the barge movement of corn and grain to Chicago and explain what they show and how they were prepared.

A. My Exhibit No. 19 shows the barge shipments of corn from ports on the Illinois River to Chicago; it is a three-page exhibit showing a comparison between the amounts of corn shipped up the Illinois River by barge during significant periods in 1955-56 and the corresponding periods in 1956-57.

The first page of the exhibit represents a consolidated summary of the corn shipments by all barge lines operating on the Illinois River for the indicated periods. The second page of the exhibit is composed entirely of shipments by the Mechling Barge Company. The third page of the exhibit presents the same information based on the shipments by all barge lines other than Mechling.

The tonnage figures presented were not arrived at by any method of sampling but rather by a systematic study of the individual barge bills for the periods indicated. The [fol. 33] bills from which the tonnage figures were compiled are on file with the Eastern Weighing and Inspection Bureau, Grain office.

Q. Will you describe the significance of the periods selected?

A. The total shipments for each period indicated have been broken down so as to show the tonnage which originated from each of the ten ports listed in the exhibit. These ports have been selected because their geographical locations paralleled the New York Central's Kankakee Belt Route. These are the barge ports with which the New York Central must compete for the business.

Q. Mr. Tasčik, are these barge ports also shown in your Exhibit No. 1?

A. Yes, they are.

Q. Will you proceed and explain the reasons why you selected the periods?

A. These periods were selected for the following reasons:

December 15, 1955 to August 30, 1956 and December 15, 1956 to August 30, 1957—it was on December 15, 1956 that the proportional rail rate on corn products became effective and it was on August 31, 1957 that notice was given to the public that the rate was enjoined pursuant to the temporary order of the Federal Court in Mechling Barge Co. et al. [fol. 34] By presenting the barge shipments for that period of December 15, 1956 to August 31, 1957 and also the barge shipments for the previous corresponding period, viz., December 15, 1955 to August 30, 1956 there is made available a comparison of the amount of corn shipped by barge when the proportional rate was in effect and the amount which moved by barge when it was not in effect. Significant is that the barges handled more corn tonnage during the period the rail competitive rate was in effect.

Now the periods August 31, 1956 to November 11, 1956 and August 31, 1957 to November 11, 1957 were selected because on August 31, 1957 notice that the reduced rate was enjoined was given to the shipping public. After that date it cannot be contended that barge shipments were affected by the 5½ cent rate.

It was thought necessary to show the barge shipments made after that date so as to indicate how barge shipments of corn in 1957 compared with shipments in 1956 during a period which was unaffected by the competitive influence of our 5½ cent rate. November 11, 1957 was taken as the cutoff date for this period because it was the last date for which complete barge billing was available for the purpose of compiling this exhibit.

The proportional rate was not in effect during either of [fol. 35] these periods in 1956 or 1957. Therefore, it is obvious the rail proportional rate played no part in barge line lesser handling in the period August 30-November 11, 1957.

The periods December 15, 1955 to November 11, 1956 and December 15, 1956 to November 11, 1957 represent a com-

parison of the shipments made during the combination of the two period referred to in the first four columns of the exhibit.

My next Exhibit No. 20 shows barge shipments of grain from ports on Illinois River to Chicago; it is a three-page exhibit showing a comparison between the amounts of grain, exclusive of corn, shipped up the Illinois River by barge during significant periods in 1955-56 and the corresponding periods in 1956-57. The "grains" used for this survey include wheat, soy beans, barley and oats.

This exhibit was prepared in the same manner as explained in connection with the presentation of Exhibit 19. Significant is that this exhibit excludes corn, and consequently the tonnage reflected in this exhibit was in no way affected by the establishment of the proportional rate on corn to Kankakee; it shows that the barges handled less grain, other than corn, in 1957 than in 1956 and this decline [fol. 36] cannot be attributed to the establishment of the proportional rate involved in this proceeding.

Moreover the increase in corn tonnage was of such magnitude as to more than offset the decrease in other grains handled, so that the net effect is that the barge shipments of all grain to Chicago in 1957 exceeded the shipments in 1956.

Q. Do you have an exhibit showing routes and earnings via departure routes to New York as a representative destination and also showing routes and earnings from the highest rated and lowest rated intermediate origins via the departure routes?

A. Yes, my Exhibit No. 21 shows this.

Q. How long have the rates from the intermediate origins shown been in effect?

A. The rates from the intermediate origins are the old McGrahaam formula rates, unchanged except for general increases or decreases.

I have been in this rate legislative end of the business for 35 years, and to my knowledge they have always been in there.

Q. Mr. Tasčik, you have described the barge competitive situation west of Kankakee. Do you have the barge com-

petitive situation at intermediate points in the Eastern territory intermediate origins?

[fol. 37] A. I don't follow you on that question.

Q. Well, do you have barge competition from the origins east of Kankakee, say in Indiana, for example?

A. No, I do not.

Mr. Murphy: Thank you. That is all on direct of Mr. Tascik.

Exam. Dahan: Do you have any questions, Mr. Bradford?

Cross examination.

By Mr. Bradford:

Q. Mr. Tascik, you stated the 5½ cent proportional rate to Kankakee only applied on corn milled in transit Kankakee and east, is that correct?

A. That is correct.

Q. Does that same restriction apply in connection with the reshipment rate applied to the ex-barge grain?

A. No.

Q. To that extent ex-barge grain still has an advantage?

A. That is correct.

Exam. Dahan: Any other direct evidence?

Is the witness available for cross examination?

Mr. Murphy: Yes.

Exam. Dahan: Would you like to have a five minute recess?

Mr. Hayes: Yes, sir.

[fol. 38] (Brief recess.)

Exam. Dahan: Come to order, please.

The witness is available for cross examination.

Which of protestants' counsel desire to proceed first?

Mr. Hayes: I should like to ask a few questions in the interest of some of these country elevators in this territory where this grain originates.

Exam. Dahan: Very well, Mr. Hayes.

Mr. Hayes: Mr. Legg will examine on behalf of the Mechling Barge Line Company.

Cross examination.

By Mr. Hayes:

Q. What is your title with the New York Central Railroad?

A. Freight Sales Manager.

Q. Is your work with the railroad that you are employed by devoted to the development of new traffic?

A. My work entails not only development of new traffic but to hold whatever traffic we are now handling on the railroad, to the railroad.

Q. Does that statement cover the scope of your duties and employment and specialization with the railroad?

A. No.

Q. Then make a statement that does.

A. What was your question again, Mr. Hayes?

[fol. 39] Q. Is there anything in the way of your responsibility for which you are employed by the railroad that you have not mentioned?

A. Well, the matter of industrial development is part of it and that is traffic development; the matter of rate legislation, adjustment of rates, that is traffic development.

There are any number of phases in railroad business that we have to go ahead and work with that develop traffic.

Q. I am talking about your own responsibility.

A. They are my responsibility.

Q. Have you mentioned specifically those that are your responsibility?

It is a very simple question, Mr. Tascik. I want you to detail the general leads that you have mentioned.

When you say that your business is to develop new traffic and keep the traffic you have got, that is the area of your responsibility and employment and specialization with the New York Central Railroad?

A. Yes.

Q. My questions are very simple. You needn't try to look for hidden meanings in them, sir.

Mr. Murphy: I am sure the witness is not looking for [fol. 40] hidden meanings, Mr. Hayes. He wants to be sure of what you are saying.

Mr. Hayes: The witness and I are getting along fine, Mr. Murphy.

By Mr. Hayes:

Q. Now will you tell me, sir, what railroad lines go east from Kankakee to destinations in official territory, without going via Chicago?

A. What railroad lines go east without going through Chicago?

None that I know of except the New York Central from Zearing through Kankakee, and that operated through Chicago.

Q. I think you confused the picture a little bit by your last clause. You said, "and that operates through Chicago."

The New York Central is the only line, is it not, that moves from these origin stations through Kankakee east to destinations in Official territory without going through the Chicago switching district?

A. No, that is not a correct statement.

If we are talking about freight rates, there are any number of freight rates that operate through Chicago from this involved territory to the east.

Q. I know there are any number of railroads that operate through Chicago to this territory in the east and your [fol. 41] answer shows, I think, that you did not understand my question.

Will you please listen to the question?

Mr. Murphy: Read the question back.

By Mr. Hayes:

Q. What line or lines of railroad are there that go from these origin stations here involved that you have mentioned on the New York Central through Kankakee to destinations in Official territory that do not go through the Chicago switching district?

Name them.

A. None that I know of.

Q. Doesn't the New York Central?

A. Well, the New York Central we expected. I have said that the New York Central does.

Q. It is the only one, isn't it?

A. Well, the Illinois Central lies in that area, so I would have to put the Illinois Central in the same category as the New York Central.

Q. Mr. Tascik, lines of the Illinois Central Railroad do not go, let us say, to Eastern and New England territory, do they?

A. No, they—the Illinois Central terminates at Chicago and Indianapolis.

Q. Then if you were to answer my question correctly and directly, the one I have asked you so many times, the fact [fol. 42] is, is it not, that the New York Central is the only railroad serving any of the stations mentioned in your exhibits that goes through Kankakee and east to destinations in Official territory?

A. That is right.

Q. Do the depressed rates here proposed by the New York Central—

Mr. Murphy: I object to the characterization, your Honor.

Exam. Dahan: Objection sustained. You don't have to characterize the rates in issue.

By Mr. Hayes:

Q. Do the Fourth Section departure rates—

Mr. Murphy: That is another characterization, your Honor.

Mr. Hayes: They are so characterized in the application, your Honor. If they weren't that, we wouldn't be here.

May I proceed?

Exam. Dahan: Go ahead.

By Mr. Hayes:

Q. Do the Fourth Section departure rates here proposed by the New York Central apply via Chicago?

A. On corn for transit, the answer is yes.

Q. Are there any rates involved in this proceeding ac-

[fol. 43] cording to your understanding other than rates for corn in transit?

A. I just thought I would qualify it. There are no others as far as I know at this time.

Q. Well, when the direct answer is an unqualified answer, please give it to me.

Do the Fourth Section departure rates proposed here by the New York Central apply via Chicago?

A. Yes.

Q. Now will you tell me, sir, please, what lines of railroad go east from Chicago via those lines and routes and rates here in question that you have referred to as the 51½ cent rate would apply?

A. By all lines east of Chicago—do you want me to name them? It would be the Pennsylvania, The Nickel Plate, The Erie, The B&O.

Exam. Dahan: It wouldn't be necessary to name them. Just answer the question.

By Mr. Hayes:

Q. Does it occur to you, sir, that the diversion of corn—On whose behalf is the Fourth Section application presented?

The Witness: May I have the question?

(Question read.)

The Witness: On behalf of the New York Central Rail-[fol. 44] road and Eastern lines.

By Mr. Hayes:

Q. By that "Eastern lines," do you mean those roads that run east from Chicago via whose routes this 51½ cent Fourth Section rate would apply?

A. Yes, all railroads parties to Tariff 245 and 335.

Q. You mentioned some kind of a study in connection with your decision to try to get these rates. Was that a study of the effect of the proposed rates on the amount of corn that would move via the Kankakee Belt Line of the New

York Central Railroad, namely its line from Moronts to Kankakee?

A. Yes, there was a study.

Q. Was that what the study was?

A. Yes.

Q. Do you have in the organization or does your company have in its organization—was that study made by you?

A. Under my direction.

Q. And in your department?

A. Yes, sir.

Q. Does it occur to you, sir, that—

Was the object of that decision to put in Fourth Section departure rates, if you could, to get corn traffic that had theretofore been moving to Chicago by barge onto the lines of the Kankakee Belt of the New York Central?

[fol. 45] A. Yes. The study was undertaken for one purpose, to develop some business for the Central from this agricultural area that was moving almost entirely by barge.

Q. When it moved by barge, it went to Chicago, didn't it?

A. Yes.

Q. And not to Kankakee?

A. That is right, and transported back to Kankakee, right where it grew.

Mr. Hayes: There is a question pending, Mr. Witness.

The Witness: What was the question?

(Question read.)

The Witness: No, but it is quite a substantial movement, several hundred cars.

By Mr. Hayes:

Q. Did you ever count up those cars or make a study of how many they were that came in to Chicago ex-barge and then moved down to Kankakee that you say to moved?

A. Yes. In fact—

Q. Where is that study?

A. Exhibit M is just a typical example of part of the movement.

Mr. Murphy: When you refer to Exhibit M, Mr. Tasčik, what is the number?

[fol. 46] The Witness: Exhibit 14, sir.

By Mr. Hayes:

Q. Let me ask you, sir, where on Exhibit 14 are we to find what part of the traffic there reflected came into Chicago by barge and what part came into Chicago by rail, including the lines of such railroads as the Northwestern, and what part came into Chicago by lake?

A. I don't have this breakdown, but it is self evident that with the corn movement by barge as shown in my exhibits, that certainly a great portion of the corn moving from Chicago to Kankakee and east had ex-barge billing behind it.

Q. Do you know what the receipts of grain in Chicago were in the period covered by your Exhibit 14 by all means of transportation?

A. Not at the moment, no.

Q. Well, you said something was self evident, and some of us might not agree with you on that.

Now referring to the grain that came into Chicago by barge and that you put these rates in to get it onto the New York Central's Kankakee Belt, what part of that grain that you were trying to get went east from Chicago without coming to Kankakee?

A. A good share of it did, probably.

Q. Well, the great majority of it did, didn't it? That is [fol. 47] self evident, isn't it?

A. Yes, I will agree with you on that.

Q. Actually you really don't know how much, if any, of the grain that came into Chicago by barge went down to Kankakee?

A. All I know is that there was billing behind every car that went down to Kankakee and that the majority of it was ex-barge billing behind it, because I have looked at those bills.

Q. Well, what percentage, sir? Where are they?

A. I can't give you the percentage.

Q. Pardon me?

A. I can't give you the percentage?

Q. Can you tell me what percentage of that movement which you say had those bills behind them was of the total barge movement into Chicago?

A. I can't tell you.

Q. I notice that your Exhibit 14 refers to grain. That is, the exhibit we last referred to in justification of your assertion, I think, that there was some of the ex-barge grain that moved to Kankakee—is that 14?

A. For clarification, Exhibit No. 14, if I say movements of grain, I should say movements of corn.

Q. That is what you do say, you say movements of grain.

[fol. 48] A. This is corn going to General Foods. I don't mind telling you that.

Q. Exhibit No. 14, does that show movement of grain to General Foods processing plants in Kankakee?

A. Yes.

Q. That is what that shows?

A. That is, yes.

Q. And that only?

A. That only, and they are only corn users.

Q. That is the General Foods that is an intervener here in support of this application, isn't it?

A. Yes, sir.

Q. I refer again, sir, to your statement as to the purpose of these Fourth Section rates to divert corn from the water movement into Chicago to the Kankakee Belt of the New York Central Railroad, and I refer also to your statement that the New York Central is the only line of rail that goes eastbound from Kankakee to destinations in Official territory without going through the Chicago switching district, and I will ask you if grain that comes into Chicago by barge, when it moves to destinations in Official territory, moves exclusively on the line of the New York Central Railroad?

A. No.

[fol. 49] Q. But when it comes from this area to Kankakee, a substantial part of it goes directly east to destinations in Official territory and can only go or can only start, by the New York Central, at least, that is true, isn't it?

A. Yes. That was a very important consideration because in this case here we were making 5½ cents to Kankakee and we were saving the absorption in Chicago. As I pointed out in my testimony, that netted us 7½ cents more than we were earning through Chicago.

If it wasn't for these elements, the rate would probably never have been established. It was this added revenue that was of such vital interest to us that resulted in our establishing this proportional rate.

Q. Have you made any study of the effect of change of traffic which you last described and also earlier referred to resulting from these Fourth Section departure rates on the revenue of the other eastern railroads prior to filing your application or since?

A. All I know is that when we made ourselves competitive with the barge route, we attracted business to the New York Central Railroad which was the objective for establishing the rates, and the traffic moved east.

[fol. 50] My concern is with the New York Central. I don't know what traffic any other railroad might have lost; my one concern was to get traffic for the New York Central.

Q. Thank you, sir.

Having said that, would you mind giving me—I am obliged for that explanation, but having said that, would you mind answering directly the question I just asked?

Read the question.

(Question read.)

Mr. Murphy: I think the question has been answered.

Mr. Hayes: That question is very simple and susceptible of a simple and direct answer.

Exam. Dahan: Is that your answer to the question?

The Witness: I have answered what I think was a proper answer to the question.

No, I don't know what effect it would have on the revenues of other railroads. Certainly when we made ourselves competitive, we picked up some business that did not go to the Chicago market, and that moved, that business moved east from Kankakee, and because it moved east from Kankakee, we earned $85 a car additional over and above what we

would have earned from Chicago had we had the haul from Chicago.

[fol. 51] Mr. Bradford: Mr. Examiner, in order to get a clear understanding of what counsel is asking, may we ask him to describe what he means by "Eastern roads"?

Exam. Dahan: Would you describe what you mean by "Eastern roads"?

Mr. Hayes: Well—

By Mr. Hayes:

Q. What did you understand me to mean, Mr. Witness?

Mr. Bradford: I don't know. That is the reason I asked.

Mr. Hayes: I am asking the witness.

The Witness: I understood your question, Mr. Hayes, that the business that the New York Central handled was business—

Mr. Hayes: Excuse me, sir, you are not answering responsively to the question. I last asked you and I wish you would.

What did you understand me to mean by "Eastern railroads"?

The Witness: Eastern railroads—

Mr. Bradford: That is what he is trying to tell you.

The Witness: Eastern lines are all lines operating east of Chicago.

By Mr. Hayes:

Q. Now,—

[fol. 52] Mr. Hayes: I am getting along wonderfully with the witness.

Mr. Bradford: You are getting along all right with me, too.

By Mr. Hayes:

Q. And you would give the same answer, I take it, as to the understanding Eastern railroads to mean those who are parties to this application in presenting it here?

A. That is right.

Q. You are not a cost man, are you, Mr. Tasciki?

A. No, sir, although costs enter into the determination of rates we establish.

Q. But you yourself are not a cost man?

A. No, sir.

Q. And you don't handle that end of it?

Is that your answer?

A. Yes, sir.

Q. I suppose, then, you didn't make any cost study of this situation before filing the application?

A. Well, it was self evident to me that this 5½ cent rate plus what I saved on the absorption charge at Chicago netted me 7½ cents more than if I handled this traffic from Chicago, so you don't have to be a cost expert to see when you can make $80 to $85 additional and for handling a car lesser distance, that it is profitable.

[fol. 53] Q. To follow the suggestion that you just made now for a moment, you started another rabbit there out in back of my question.

You actually put in this rate with the idea of getting away from having to take this grain through Chicago, is that right?

A. Actually with the intent of hauling the grain from the country origins west of Kankakee to Kankakee and east thereof to the greatest extent possible.

Q. Without going through Chicago?

A. Without going through Chicago.

Q. But your rate applies via Chicago?

A. It does, yes.

Q. Why?

A. It has been that way for 35 years. Your Kankakee and reshipping rates have always been on an equal basis and your rates apply either from Kankakee through Chicago or from Chicago through Kankakee.

Q. I understand you. I think I understand you very well. The water transportation is to Chicago, isn't it?

A. Yes.

Q. And the transportation you are trying to develop was to and through Kankakee to eastern destinations without going through Chicago?

[fol. 54] A. Nothing wrong about that. That is exactly what I had in mind.

Q. Now getting back to my question about the cost studies, I asked you if you made a cost study. Do you want to save time and state frankly that you did not make a cost study?

A. No, sir, because I did not think it was necessary.

Q. Well, then, you didn't make a cost study because you didn't think it was necessary?

A. No, because $85 added revenue spoke for itself.

Q. Tell me, please, Mr. Witness, whether you did or didn't make a cost study?

A. No, I said no.

Q. All right.

Now, did anybody else make a cost study that you know of?

A. No.

Mr. Hayes: May I have a few minutes, Mr. Examiner? I mean to go on, obviously, but I should like three minutes at this point, if I may have them.

Exam. Dahan: Very well. You may have them, you may have three minutes. We will go along with another examination.

Cross examination.

By Mr. Legg:

Q. Mr. Tasčik, do you have any figures at all indicating [fol. 55] how much of this corn coming into Kankakee from the Kankakee Belt stations on the 5½ cent rate goes through Chicago on its way to its eastern destination?

A. Well, I can answer your question in this manner, that I don't mind telling you that during the period this rate was in effect, we originated 2411 cars of which 20 per cent went into Chicago and of this 20 per cent the preponderance of it was corn under government CCC programs, and therefore the 5½ cent rate had no effect on the movement.

Q. You don't know what percentage that was?

A. No, but I can tell you that I don't believe there were

more than 15 or 20 cars that moved through Chicago on which the 5½ rate applied. At least that was what I developed up until a few months ago.

Q. For what period was that study?

A. For the first six months of 1957.

Mr. Murphy: Were your total figures for the first six months, sir, the 2400 cars?

The Witness: No, that was for the entire year, the 2411 cars.

By Mr. Legg:

Q. For the entire year 1957?

A. '57, yes.

Q. And the 15 or 20 cars were for the past six months?

[fol. 56] A. For the first six months.

Q. You don't know how many were sent through in the last six months?

A. No, I haven't made a check in the last six months. It wasn't very much, I can tell you that.

Q. Would it be in the order of 15 or 20 more cars?

A. Possibly. I don't know. I couldn't tell you.

Q. You just don't have any idea at all?

A. No.

Mr. Hayes: Did he say he did not have any idea?

By Mr. Legg:

Q. You agree you have no idea?

A. I don't know how many cars. I didn't make a check in the last few months.

Mr. Hayes: And have no idea?

Mr. Murphy: Mr. Hayes, this follows after a number of other questions.

Mr. Hayes: Yes, I know what they are.

Mr. Murphy: Did you hear the answers, sir?

Mr. Hayes: Let's hear the answer to my question.

The Witness: Yes, that is right. That is my answer.

Mr. Hayes: You have no idea?

The Witness: Yes, because the rate was enjoined, and I don't know what happened since the rate was put back in effect, I haven't made a study.

[fol. 57] By Mr. Legg:

Q. Mr. Tascik, referring to your Exhibit 19, you have included the three stations or elevators at Henepin, Henry and Lacon in that exhibit, that is correct, isn't it?

A. Yes.

Q. Have you any idea what the normal movement of corn from those elevators is? Do you know how it ordinarily is transported?

A. No, I do not.

Q. Or in what direction it goes?

A. No.

Q. Do you know whether it would go down river or up river?

A. I know this particular grain moved through Chicago or to Chicago.

Q. It moved to Chicago in this year, the particular grain listed moved to Chicago for the periods listed in this exhibit, is that true?

A. That is right.

Q. You do not know how much ordinarily moves to other points from these same three stations?

A. From these same three stations, no. I wasn't interested in developing that because I was thinking about my own eastern situation.

Q. You do not know, then, whether the barge lines have [fol. 58] carried as much corn from these three stations either north or south in the period December 15, 1956 to August 30, 1957 as they did in the period December 15, 1955 to August 30, 1956?

A. No, I do not.

Q. And if you eliminated those three stations from the exhibit, would not the exhibit show a substantial decline in the amount of corn hauled by the barge lines from the other remaining stations to Chicago for the period December 15, 1956 to August 30, 1957 below that hauled during the period December 15, 1955 to August 30, 1956 from these stations?

A. Whatever the addition would produce would be the result, but I don't see where you can just use the tonnage factor for Henepin, Henry and Lacon without taking into consideration the tonnage factor from the other stations shown on the exhibit. You have increases and decreases on them, too.

Q. I think, Mr. Tascik, you have misunderstood my question. If you eliminate the three stations of Henepin, Henry and Lacon from the exhibit, would not the remaining stations show a decline for the latter period than they do for the earlier?

Mr. Murphy: You are referring to columns 1 and 2, Mr. Legg?

[fol. 59] Mr. Legg: I am referring to columns 1 and 2.

Mr. Murphy: Will you do that arithmetic, Mr. Tascik, please?

To shorten this up, Mr. Legg, I compute that there was a 60,000 ton increase at those three ports as compared with a 91,000 ton increase at the other ports, so I think the answer would be contrary to what you expected.

Mr. Legg: Would you make the same computation now on page 2 for the shipments by Mechling Barge Line?

Excuse me. Will the witness accept Mr. Murphy's answer?

The Witness: Yes, I will.

Mr. Legg: All right.

The Witness: I don't know how accurate these figures are, but I come up with column 1, eliminating the last three stations, 140,670 to 129,094.

Is that what you come up with?

Mr. Murphy: What page of the exhibit?

The Witness: Page 2 of the exhibit.

Mr. Legg: Page 2, columns 1 and 2.

I don't come up with anything close to that, no.

Exam. Dahan: I am just wondering whether it is necessary to ask the witness on the stand to sit down and make computations.

[fol. 60] If computations can be made from any exhibits, I would prefer that the person put it on in his own direct evidence so that we can save a lot of time. If we are going to sit down and have the witness compute this and compute

that, we will be here for weeks, unless it is absolutely necessary for the question.

Matters concerning computations and figures from exhibits, we would like to have those put on on direct examination and if the other party wants to put on rebuttal evidence, they may do so.

Mr. Legg: May I say this, that my own computation, Mr. Examiner, shows a decline in the latter period of—it shows an elimination in the latter period of 77,052 tons and for the earlier period an eliminating of only 25,702 tons, leaving a net decline for the latter period by eliminating these three stations of 51,352 tons.

I would like to have those in the record subject to check by the parties.

Mr. Murphy: I object to that. I mean, he can make these computations on brief. I don't want to be stuck with something that is a hasty calculation when we have no opportunity to check it that fast.

Mr. Legg: They are subject to check, Mr. Examiner.

Exam. Dahan: What is the purpose now that you want [fol. 61] them in for? Do you have a particular question you want to direct to the witness with respect to the figures and computations you have made, or are you just trying to—

Mr. Legg: No, I don't have any further questions along that line.

Exam. Dahan: All right. Go ahead.

By Mr. Legg:

Q. Could you tell me the barge lines whose shipments are included in page 1 of your Exhibit 19?

A. Well, these exhibits were made under my direction from bills on file with the Eastern Weighing Inspection Bureau here at Chicago, and when it was made up, it was segregated as between Mechling and the other barge lines. I just can't tell you because I didn't make up the exhibit personally.

Q. You don't know who the other barge lines are?

A. No.

Q. Can you ascertain that and advise me at a later time during the hearing?

A. I presume we can, yes. There are work sheets in the office.

Q. Mr. Tascik, is there a more direct route to Kankakee from Chicago than the route which you mentioned in your testimony running through Indiana Harbor and Schneider?

[fol. 62] A. Oh, yes, the Illinois Central is a more direct line. I think their mileage is somewhat lower, yes, but it doesn't—it isn't doing the New York Central any good.

Q. Is the Illinois Central a party to this Fourth Section application?

A. In so far as it applies to official territory.

Q. Mr. Tascik, have you any information at all about the sources of the corn which comes into the elevators along the Kankakee Belt west of Kankakee?

Do you know in what areas that corn originates at the present time?

A. Moving all rail?

Q. Moving all rail.

A. From the territory surrounding that particular station.

Q. Do you know how far out the station draws corn?

A. No.

Q. Do you know how many miles the farmer will truck to a particular elevator in order to get this rate?

A. I don't know. All I know is that I am dealing with an elevator that is right adjacent to the railroad tracks. Where he gets his corn from, I don't know.

Q. You don't know whether any corn might be coming from east of Kankakee to a station west of Kankakee in order to take advantage of this 5½ cent rate and the pro-

[fol. 63] portional from Kankakee on?

A. Well, I think the economics of trucking would dictate how far they would truck grain. I couldn't tell you. All I know is that I certainly am interested in the transportation from a transportation standpoint and my business originates right in that elevator.

Q. I see. You are concerned about the economy of transportation—you are not interested about the economy of

transportation if it has to be trucked from east of Kankakee to west of Kankakee and then run back by rail; you are only interested in the economy if it goes to—

Mr. Murphy: I object to the argumentative question, your Honor.

Mr. Legg: I think it is—

Mr. Murphy: It sounds like a statement. It doesn't sound like a question at all.

Mr. Legg: The witness has stated, Mr. Examiner, that he was concerned—

Exam. Dahan: If he has stated on the record, that is, then we don't have to go along and try to get the answer.

Mr. Legg: He stated he was concerned about the uneconomic transportation between Chicago and then back to Kankakee. He doesn't seem to have the same concern—

[fol. 64] Mr. Murphy: That is argument.

Mr. Legg: I was questioning whether he had that same concern—

Exam. Dahan: Do you have a question?

Mr. Legg: I certainly would like to know whether he is concerned about that.

The Witness: You are making it a parallel Chicago to Kankakee versus trucking to the elevator at Kankakee?

Mr. Legg: No.

The Witness: Or trucking to elevators on the west end stations, is that it?

Mr. Legg: That is right, from east of Kankakee.

The Witness: All right. Now in the case of Chicago to Kankakee, I have a transportation factor involved. I am talking about the New York Central now. Whether it is wasteful transportation or not, we have a factor there involved.

In the case of the elevator, I am not involved to the same extent because all I have there is the transportation from the elevator to Kankakee, and my parallel is what is the difference from that elevator to Kankakee versus Chicago to Kankakee.

Q. You don't know how far they are trucking, though, to the elevator from the farms or from what directions?

A. No, I wouldn't be able to tell you. The elevator op-
[fol. 65] erator would have to tell you that.

Mr. Legg: Will they be here to testify, Mr. Murphy?

Mr. Murphy: We will have some.

By Mr. Legg:

Q. Mr. Tascik, are you familiar with all of the traffic that moves over the Kankakee Belt line of the New York Central?

A. I am, yes.

Q. Could you describe that traffic for us briefly?

A. I don't have the destinations and the origins, but I think this will satisfy what you are after: During the year 1956 the New York Central had a substantial movement of crushed stone from Lehigh, Illinois, and I testified to that effect.

During the year 1956, the New York Central had a movement, a fair movement, I will say, in the neighborhood of about 1,000 cars, from Streator, Illinois, and I testified there were concerns in Streator doing business.

Q. I beg your pardon. Now that is from Streator to the east?

A. That is right. Now in contrast—

Q. You say that is about a thousand cars?

A. Yes.

From Blair, not a car in '56; Budd, not one car in '56; Dwight, not one car in '56; Granville, not one car in '56; [fol. 66] Lostant, not one car in '56; McNabb, three cars in 1956, and they were telegraph poles; Missal, not one car in '56; Moronts, not one car in '56; Priscilla, not one car in '56; Reading, not one car in '56; Smithsburg, not one car in '56; Union Hill, not one car in '56; and Van's Siding, we had a movement of sand from the sand pit at Van's Siding.

Q. Were those all eastward movements, now?

A. Those were eastward movements.

Q. What westward movements did you have?

A. I didn't check the westward, but it would be the same situation. There is no traffic at those stations, to be frank with you.

Q. Is there any substantial traffic to Streator westward?

A. I mentioned that the Streator business amounted to about 1000 cars in 1956.

Q. You said that was to the east, though?

A. To the east.

Q. What about to the west?

A. To the west, I didn't check that down there, but—

Q. You haven't any idea?

A. No, but it isn't substantial, I can assure you, because the movement out of Streator is mostly glass from the Owens Illinois Glass plant, and that of course doesn't [fol. 67] result in any inbound business for us.

Mr. Murphy: Mr. Legg, when you are referring to originations of eastbound movements, you mean origination of traffic moving to those stations?

Mr. Legg: Eastbound.

Mr. Murphy: It would be originating?

Mr. Legg: Well, let me ask this:

By Mr. Legg:

Q. You were referring to originations?

A. Originations going east.

Q. So far as destinations at these stations westbound, was your answer based on that assumption?

A. Westbound, I do not have the figures here with me, but I did say the same picture would hold true westbound as it does eastbound; but westbound you would have no stone going to Lehigh, you would have no movement westbound, you would have no sand going in to Van's Siding, so of course that movement wouldn't be there. The preponderance of your traffic would be eastbound because you use sand in making glass and that glass would come in via a western line into Streator.

Q. Do you have any movement to Streator to make connections with other lines?

A. Interchange?

Q. Yes.

[fol. 68] A. Oh, yes, we have interchange points.

Q. Is that movement substantial?

A. I don't have these figures with me, but the Kankakee Belt as you know what that was designed for, it was de-

signed to bypass the Chicago gateway and naturally we do have an interchange of business at some of these junctions.

Q. Could you name the junctions at which you do have interchanges?

A. I don't have the Kankakee Belt here, but I can start out with Zearing, which is CB&Q, it is not involved in this proceeding;

At DePue, you have the Rock Island;

At Streator, you have the Santa Fe;

At Dwight, you have the Alton;

At Reddick, you have the Wabash;

And at Kankakee, the Illinois Central.

Q. Do you have a connection with the Chicago, St. Paul & Milwaukee at Ladd?

A. Yes, at Ladd, but there isn't any traffic moving through there. The Kankakee or the Milwaukee junction for handling business over the Kankakee Belt is Delmar, that is the junction via which the traffic moves.

Q. The interchange of traffic consists entirely of loaded [fol. 69] cars, does it not?

A. No, I don't know. Interchange business would be loaded and empty cars.

Q. It would be both loaded and empty?

A. Yes.

Q. And some less than carload freight as well as full carload freight?

A. It would be a carload as far as the interchange is concerned. If it is a merchandise car, it would be a carload of freight that was interchanged.

Q. If it were not a merchandise car, then what?

A. Well, I am assuming you are talking about a trap car, or, we will say, a transfer car from one house to another. It is still, as far as the physical interchange is concerned, a carload of freight.

I am talking about handling a car. It makes no difference if it is LCL in there or whether it is grain in there or bolts, or bottles, whatever you want to put in there, it is still a car.

Q. All you are doing, though, is carrying the car to the interchange line and delivering it to them?

A. That is right, but you don't want to give any impression that you have any LCL originating in any of these stations, because you don't have any agents at three-fourths of these stations because there is no business.

[fol. 70] Q. You are certain, though, that there is no traffic destined to these stations from the east?

In other words, there is no traffic coming from the east to the stations involved in this application with the single exception of Streator?

A. I told you that I didn't make a check, but the situation would be substantially the same. I haven't got the exact detail, but if we came down to actual figures, I will be glad to present it to you here for the record if you want it, because you would even have a poorer showing westbound than eastbound because you don't have the stone moving out of Lehigh, you wouldn't have that westbound, you wouldn't have the sand from Van's Siding, so that would disappear.

So about the one items you would handle would be into Streator, and if you would like to have those figures for the record westbound, I would be glad to furnish them for you.

Q. Could you give us the class of equipment also?

A. I will be glad to do that for you.

Q. Do you know where the New York Central maintains yard operations along the Kankakee Belt?

A. Yes, Kankakee, Illinois.

Mr. Murphy: I might say possibly for the assistance [fol. 71] of counsel we will have an operating man who can describe the operations if you want to hold such questions for him.

By Mr. Legg:

Q. Mr. Tascik, have you made any study of the effect of the 5½ cent rate on the shipments of corn on other rail lines in this Kankakee Belt area?

A. There was no corn moving to the other rail lines.

Q. I beg your pardon. Would you answer my question yes or no?

A. You are talking about originating on foreign lines in this territory now or on the New York Central?

Q. I am talking about originating on other lines than the New York Central. Have you made a study?

A. I don't know. I would have no access to their records. I don't know.

Q. You have made no study, you have no knowledge?

A. No.

Q. You have made no—you stated in your direct testimony, did you not, that barge-rail combinations together amounted to a lower rate than the local rate from Chicago and from Kankakee also, of course, to eastern destinations?

A. Yes, the local rate from Chicago to New York is 71½ cents; from Kankakee it is 71½ cents.

[fol. 72] Q. And the barge-rail combination to New York would be how much from, say, Morris, Illinois, via Chicago?

A. Well, it would be the barge factor.

Q. It would be lower than the local rate?

A. Yes, I stated that.

Q. That is what I meant.

A. I said that in the direct testimony.

Q. Is this departure protected by a Fourth Section authority from the Interstate Commerce Commission?

A. Actually the barge rates don't require Fourth Section relief, and that is where our disability comes in. The barge factor up to Chicago is of no concern. It is the Fourth Sections on the rates from Chicago as an origin and destination.

Q. The Fourth Section order, though, giving authority for the maintenance of the proportional rate from Chicago and also allowing their application on ex-barge corn, too, has been issued by the Interstate Commerce Commission?

A. Yes, it has.

Q. Has any such order been issued by the Interstate Commerce Commission with respect to corn moving from these stations on the Kankakee Belt west of Kankakee via Kankakee to eastern destinations?

Read the question.

[fol. 73] (Question read.)

By Mr. Legg:

Q. At the 5½¢ cent rate and the proportional rate from Kankakee beyond?

A. Yes, an order has been issued in this proceeding.

Q. Prior to that order had any authority been received from the Interstate Commerce Commission?

A. No, and I explained why in my testimony. We didn't think it was necessary.

Q. You did not ask for it?

A. That is right.

Q. Are the through rates from these stations west of Kankakee to eastern destinations also protected by Fourth Section authority?

A. Yes.

Q. Could you give me the order?

A. No, I don't know. I would have to go ahead and get the Tariff 68, and whatever the Tariff is, it speaks for itself. The rates are in WTL 68-R.

Q. Mr. Tascik, I notice in your Exhibit No. 13 you show the great preponderance of cars originating from the stations at Union Hill, Blair and Dwight.

Have you any reason for that preponderance in origination? Do you know of any?

A. No, but I couldn't account for it. Probably there has always been a corn movement, but if you want to refer to [fol. 74] Exhibits 4 and 5, you will find the same situation prevailing and I presume there is more corn grown in that territory.

Q. Do you know how much corn has moved to Chicago via the Alton Railroad from Dwight since this rate went into effect?

A. No, I don't.

Q. Do you know what the Alton Railroad's rate from Dwight to Chicago is on corn?

A. No.

Q. Do you know that it is more than 5½ cents?

A. I would assume it is, yes, and it is probably not handling any corn on it, either.

Q. You told me earlier, I thought, that there was no traffic originated in the year 1956 from the stations of Union Hill and Dwight and Blair.

A. Other than grain.

Q. Other than grain?

A. That is what we were talking about.

Q. I see.

You did originate grain from these stations, then?

A. Oh, yes, the exhibit shows it. Exhibits 4 and 5 speak for themselves.

Q. There is no conflict, then, between—

A. No.

[fol. 75] Q. —between your testimony?

A. No.

Q. How much grain other than corn originated from these stations in 1956?

A. I gave you those figures from every station.

Mr. Legg: I have no further questions at this time.

Exam. Dahan: All right.

By Mr. Hayes:

Q. You made some reference in your direct testimony to export rates. Do you think those should be taken as the measure of the proper level of domestic rates?

A. The proportional rate on—yes, I think it could be taken as a measure of the level of rates, yes, it should be.

Q. If you did that, sir, on all New York Central rates, it would work a very substantial diminution, depressing result in your level of domestic rates, would it not?

A. We have no intention of applying the 5½ cent proportional rate to export traffic—I mean, let's face things factually here. If you want to ask me a direct question and make it specific, I will be glad to answer.

Q. Please read the question I asked the witness and see if you find it sufficiently direct and specific to answer.

[fol. 76] (Question read.)

Exam. Dahan: If you don't understand the question, let him rephrase it so you understand it.

The Witness: I don't understand the question, Mr. Hayes.

By Mr. Hayes:

Q. You told me that you thought that the comparison with export rates was a fair standard by which to judge this rate, and I believe you referred to export rates in your direct testimony.

Now, sir, if you—by you I mean the New York Central Railroad—since you are its traffic solicitor—should put all of your domestic rates down to the level of your export rates, it would greatly lower the level of your domestic rates over your New York Central lines, wouldn't it?

A. There is no question about it, but don't have any fear of anything like that happening.

Q. I am not worried about its happening anywhere except on this line and I am wondering why you conceive that export rates are a proper measure of domestic rates, Mr. Witness.

Mr. Murphy: Counsel, would you distinguish at least between maximum reasonableness and minimum reasonableness? You do, don't you?

[fol. 77] The Witness: I think it is proper to make comparisons to show the level of grain rates and the percentage they reflect to 28300. I can't see anything objectionable to it. I think it is a good standard of test.

By Mr. Hayes:

Q. Then why don't you put your other rates down to your export rate level?

Is that sufficiently direct and specific to answer, sir?

A. It is, yes.

Q. Answer it, please.

A. There is no need for it.

Q. Do you think you would have revenues enough to operate your railroad on if you did that?

A. I don't know. We are looking for more money all the time to keep the railroad solvent and this was one reason why we established a 5½ cent rate.

Q. I think you mentioned that the same situation applied at Kankakee as applied at Danville and other break points at various places in your testimony. Just in what respect is it the same?

A. For the same reason that the 5½ cent proportional rate applies to Kankakee and the Kankakee reshipping rate applies to the east with transit at Indianapolis, at Toledo, at Fostoria, any point you want. You still go back to the [fol. 78] reshipping rate to Kankakee in the same fashion as you go back to the reshipping rate to Chicago on corn transited intermediate to Chicago.

Q. Now, let's see. Danville and Paris are in Illinois, aren't they?

A. Yes, sir.

Q. Do you mean when you say that the situation at Danville and Paris and those other junctions is the same, that this 5½ cent rate off of these Kankakee Belt origin stations would apply if the grain moved to Kankakee and then to Paris or Danville and thence east on an eastbound proportion, is that what you mean?

A. Yes, sir. That is, if the 54 cent rate from Kankakee, the reshipping rate, applies today through Kankakee, and Danville, it will apply in conjunction with the 5½ cent proportional rate.

Q. Just for quick reference, would you tell us for the record where Paris, Illinois, is?

A. Well, it is on the Indiana-Illinois border. I just don't have the—I cut off my map here but it is downstate.

Q. How far, do you know?

A. It is south of Danville. I don't have the mileage here, but it is sufficient that the Chicago and Kankakee reshipping rates apply through Paris and to the east.

[fol. 79] Q. How many cars have moved out of these Kankakee Belt stations subject to application of this 5½ cent rate via Paris and Danville?

A. I don't have those figures with me, but I can give them to you later in the day.

Mr. Hayes: I would like to have those.

By Mr. Hayes:

Q. I think there was a reference in your direct testimony, and you correct me if I am wrong, I don't mean to misquote you, or if I do misquote you, correct me—I think there was

a reference to some kind of a rate to Port Cargill, is that right?

A. That is right.

Q. And you figured the return on that rate based on 100,000 pounds per car, if I recall?

A. That is right.

Q. What is the minimum weight for application of this 5½ cent rate according to the published tariff?

A. 100,000 pounds.

Q. Not 110,000 pounds?

A. No.

Q. Do you know what the average loadings were on that movement to Port Cargill?

A. No, I don't know except that they would probably be substantially the same because the minimum weight is the marked capacity of the car.

[fol. 80] Q. And the same goes for your movements on the Kankakee Belt?

A. Yes.

Q. 100,000 pounds?

A. Except I have actual proof that we are running 110,000 pounds and better.

Q. Do you have any documentation of that statement that you can supply?

A. You will see some of them later in the day, Mr. Hayes, some other witness will put them in.

Q. I should like to have that documentation.

What is the mileage from Kankakee to Chicago on the line you used?

A. 74 and nine-tenths miles,—let's call it 75.

Q. And the proportional rate east from Chicago which engages this 5½ cent rate is how much to New York?

A. You mean New York or Kankakee now?

Mr. Hayes: Read the question.

(Question read.)

Mr. Murphy: That is shown in one of our exhibits.

The Witness: It is just—as soon as I find the exhibit right here, I will tell you.

To New York is shown in several exhibits, but take Exhibit No. 15, the distance from stations west of Kankakee,

Illinois to New York is 1,002.7 miles. This is based on 38.3 [fol. 81] miles to Kankakee.

Mr. Hayes: Mr. Examiner, the witness obviously didn't understand what I asked him. Please listen to the question.

(Question read.)

Mr. Murphy: Will you refer to your Exhibit No. 16, Mr. Tascik?

The Witness: Exhibit No. 16, the distance from Chicago to New York short line, 890 miles.

By Mr. Hayes:

Q. Now,—

Mr. Murphy: I believe Mr. Hayes wants the Chicago reshipping rate to New York, Mr. Tascik.

The Witness: The Chicago reshipping rate to New York, 54 cents.

I thought we were talking about mileages.

By Mr. Hayes:

Q. Let's see if we can't get together, Mr. Tascik.

You told me the distance from Kankakee to Chicago via the line used by the New York Central over which this rate applies was 74 and nine-tenths miles?

A. That is right.

Q. Then I asked you, after you got this grain say from Moronts to Kankakee for 38 and three-tenths miles and then 74 and nine-tenths miles further to Chicago, all for 5½ cents, what is the rate that is engaged at Chicago for [fol. 82] transportation east to New York?

Mr. Murphy: I object to the question because it is a statement contrary to the facts in the record, a statement that he transports from west of Kankakee to Chicago all for 5½ cents.

By Mr. Hayes:

Q. When you transport grain to Kankakee, you get 5½ cents for it?

A. That is correct.

Q. We are speaking of corn for remilling in transit at these rates?

A. That is right.

Q. Then when you go on from Kankakee without going through Chicago directly by the line of the New York Central Railroad, that doesn't go through Chicago, and what is the rate that is engaged at Kankakee for such direct shipment to New York?

A. 54 cents.

Q. And that would be true if that grain originated at Moronts, wouldn't it?

A. That is correct.

Q. Now let's take that grain and start it at Moronts, it pays 5½ cents, doesn't it?

A. To Kankakee.

Q. Yes, I know, and then it pays exactly 54 cents when it goes this additional 74 and nine-tenths miles up through [fol. 83] Chicago.

A. May I clear you up?

Q. To engage the Chicago proportional rate of 54 cents outbound.

A. May I clear this up for you, Mr. Hayes?

Q. I would like to have you answer my question if you don't mind.

A. On your movement of a carload of corn from Moronts to Kankakee via Chicago and east thereof to New York, the rate would be 5½ cents to Kankakee. On the movement from Kankakee via Chicago to New York you would use the Kankakee reshipping rate of 54 cents which is the same as the rate from Chicago and the New York Central would earn a portion of that rate for its move to Chicago and not out of the 5½ cent rate.

Q. Well, the revenue derived by the New York Central then, if I understand you—

Off the record.

(Discussion off the record.)

[fol. 84] Q. Well, the revenue derived by the New York Central then, if I understand you, so far as published tariffs are concerned, on a movement of corn from Moronts to

Kankakee and thence directly to New York without going through Chicago is 5½ cents plus 54 cents, is that right?

A. That is right.

Q. And it is on that basis that you computed a 38.3 miles average, referring to the Moronts to Kankakee mileage?

A. That is right. That is the average weighted movements distance of our movements.

Q. These rates also apply, the 5½ cent rate, doesn't it?

A. The 5½ cent rate—

Q. Just state that it does or doesn't.

A. The rate applies in combination with the re-shipping rate from Kankakee.

Q. Yes, and the reshipping rate from Kankakee is 54 cents, is it?

A. That is right, and that is what I have been saying.

Q. And when you go via Chicago, you have this extra 74.9 miles, is that right?

A. When I come in the reverse direction, yes.

Q. That is right.

A. Yes, I have the same thing in both directions.

[fol. 85] Q. Then your revenue, speaking about revenue per car miles, your revenue when your traffic moves via Chicago is 5½ cents plus 54 cents, just as it was when it moved that much shorter distance to Kankakee and then directly east, that is true, isn't it?

A. Yes. Today, yes.

Q. So the added revenue so far as published tariffs is concerned to the New York Central that it gets for all the service that it performs west of Chicago or Kankakee comes down to a 5½ cents figure which is then added to a 54 cent figure whether it goes east via Kankakee or Chicago?

A. That is right.

Q. Yes, that is exactly right.

A. Except that I want it understood out of the re-shipping rate from Kankakee via Chicago, the New York Central earns a portion of that revenue if the car moves out via competing line, so we get some revenue for that car.

Q. How much?

A. 13 cents.

Q. Is that per hundredweight?

A. Yes.

Q. That is your division out of the eastbound proportional?

A. Yes.

[fol. 86] Q. When it goes via Chicago?

A. Yes.

Q. So that division is paid the New York Central, then, by the railroad other than the New York Central that moves grain east from Chicago, is that correct?

A. That is right, yes.

Q. How do you—strike that.

That is all.

Mr. Hayes: I have a number of questions.

Exam. Dahan: Did you say a number of questions?

Mr. Hayes: Yes.

Exam. Dahan: We will recess at this time for lunch until 2:00 o'clock.

(Whereupon, at 12:00 o'clock noon, a recess was taken until 2:00 o'clock p.m. of the same day.)

[fol. 87] AFTERNOON SESSION 2:00 p.m.

Exam. Dahan: You may proceed.

I would like to ask the protestants to confine their cross examination to the direct evidence as presented. In the event that they want to digress at all, I would like to have them ask my permission and give their reasons therefor.

The applicant here has a burden of proving his case, and I don't think he is looking for any help from protestants at all, and just confine the cross examination to the direct evidence.

I think we will get along a lot faster and everyone will be happier.

Mr. Hayes: If anything I ask seems not to be germane to the direct examination, please call my attention to it. I am directing it to that.

Exam. Dahan: I just want this examination to go along. I wasn't referring to any questions that have been put before this to this witness beforehand. The examination has been long and there are others that are waiting to cross examine.

Another thing I want to say is that I don't want any repetition by different protestants, so that maybe you will want to get together before you proceed to see who is going to ask what.

[fol. 88] We would like to have the procedure of this hearing go right along as smoothly and as fast as possible.

By Mr. Hayes:

Q. You stated, I think, Mr. Tascik, on your direct examination that the rate from Chicago to New York is also the rate from Kankakee to New York, referring to the proportional rate on such commodities as are here involved which was 54 cents?

A. Yes, that is correct.

Q. That is the rate on corn products?

A. Corn products.

Q. What is the rate on—of course the rate on bulk corn would be somewhat less?

A. 53 and a half.

Q. When the eastbound carrier other than the New York Central takes corn that has moved into Chicago on this 5½ cent rate, you stated before the adjournment that that eastbound carrier gives back to the New York Central 13 cents?

Mr. Murphy: I object to that, your Honor. I don't think that is material on the question of whether or not the rate is reasonable or not.

Exam Dahan: Objection sustained.

Mr. Hayes: I would be glad to argue that, Mr. Examiner. I think it is very material to this rate.

Exam Dahan: The objection has been sustained.

[fol. 89] Mr. Hayes: I would like to be heard on it.

Exam. Dahan: If you want to make a statement on the record, you may do so.

Mr. Hayes: Yes, sir.

The rate as proposed is proposed as a rate applicable via Chicago. It now appears that the eastbound carrier gets 54 cents for that service when it is another carrier than the New York Central, out of which, when it receives the corn from the New York Central, it makes a return of 13 cents

to the New York Central, and it thereby realizes as a charge made for its services for transporting that grain east from Chicago the sum of 43 cents—I beg your pardon, the sum of 41 cents.

Obviously there is no such 13 cent division with the barge lines. The result is that the eastern carrier for the same service is exacting 41 cents for the transportation of this ex-rail grain whereas it exacts 54 cents for the transportation of ex-barge freight, which, as I will submit and do submit, makes the application of that rate via Chicago on that basis of charge an illegal rate since it discriminates against the traffic of the connecting water carrier by taking 54 cents for moving the traffic from the connecting water carrier, whereas only 41 cents is the ultimate charge for moving the traffic of this connecting rail carrier.

[fol. 90] Exam. Dahan: Well, I don't so understand that, Mr. Hayes, and the objection has been sustained. Your argument will stand in the record.

Continue with your examination.

Mr. Hayes: I thought that if that were the fact, it would be material to bring it out. I thought it had been made fairly plain on the record.

Exam. Dahan: As I understand, the reshipping rate of 54 cents applies from Kankakee to Chicago and from Kankakee direct to the east.

Mr. Hayes: I didn't hear that.

Exam. Dahan: As I understand it, the 54 cent reshipping rate applies from Kankakee through Chicago to the east and from Kankakee direct to the east, is that not right?

Mr. Hayes: That is correct, yes, sir.

Exam. Dahan: What you are trying to say now is that when it operates through Chicago, that you are going to take part of the division off of that rate, and the proper rate for the other carrier from Chicago through is the rate from Chicago to the east and discriminates against the barge lines.

Mr. Hayes: The actual charge realized by the eastern carrier.

Exam. Dahan: I don't agree with you, but I sustained the objection and it is not pertinent to the issues in this par-

[fol. 91] ticular proceeding.

So you go along and examine the witness if you have another line.

Mr. Hayes: Yes. For the sake of the record, my objection to the Examiner's ruling may stand?

Exam. Dahan: Very well.

By Mr. Hayes:

Q. You calculated, I believe, sir, that you made about 85 dollars additional revenue out of this proposed rate, am I correct in that?

A. That is right.

Q. What made up that $85.00?

A. The 5½ cent proportional rate to Chicago which was in and above the re-shipping rate.

Mr. Murphy: To Kankakee, you mean.

The Witness: To Kankakee, was in and above the re-shipping rate. The fact that the traffic did not move to Chicago, there was a 2 cent absorption charge saved, so the net effect was a 7½ cent saving or net to the New York Central.

By Mr. Hayes:

Q. When the corn takes this routing that you suggested it took to General Foods, up to Chicago and back to Kankakee—

Mr. Murphy: You are speaking of the barge-rail route, Mr. Hayes?

By Mr. Hayes:

Q. I am speaking of corn that moves via the New York [fol. 92] Central from Chicago to Kankakee, how it gets there, and however it gets there.

How much of that corn either as corn or corn products moves south out of Kankakee on the lines of the Illinois Central?

A. None that I know of.

Q. Well, does any of it?

A. No, because the Illinois Central is not an eastern line.

Q. Doesn't General Foods ship into the south, sir?

A. The rate application has only effect to Official Territory.

Q. Yes, I know, but this grain that comes down as you showed on your exhibit was grain you said for General Foods. Insofar as General Foods ships into the south on points that would be reached by the Illinois Central, that grain would go out by Illinois Central, would it not, sir?

A. Well—

Mr. Murphy: I object to this question. I don't know that the south is involved in this case, your Honor. We are dealing with destinations to the east.

Exam. Dahan: What is the purpose of the question?

Mr. Hayes: The purpose of the question is to show that there is a considerable volume of this grain that he refers [fol. 93] to that they lose control of at Kankakee on this movement. If it went to Chicago, they would get their share of it.

Mr. Murphy: I don't know why counsel can't show that with his own witnesses if that be material.

Mr. Hayes: This is the witness that knows, I suppose.

Exam Dahan: What movement are you talking about? I just don't understand you, Mr. Hayes.

Mr. Hayes: The witness is talking about a big saving to be made or additional revenue. Actually I think he loses revenue so far as—

The Witness: Mr. Hayes,—let me answer the Examiner's question, please.

Mr. Hayes: Let me answer the Examiner's question, please.

Actually I think he loses revenue insofar as that corn takes a movement southbound out of Kankakee. He doesn't get additional revenue by that movement,—I mean, through this rate.

Exam. Dahan: In other words, you are talking about southern traffic to the south and here I believe the witness is talking about traffic to Official Territory. Are those two one and the same thing?

The Witness: May I clear this point up?

Mr. Hayes: No, your Honor, the destination—

[fol. 94] The Witness: Now—

Exam. Dahan: Yes, you may.

The Witness: Tariff 7018 that carries this 5½ cent proportional rate has only application to Official Territory.

Exam. Dahan: So it would have no application to what traffic Mr. Hayes is trying to bring out.

The Witness: No, no, it is very specific.

By Mr. Hayes:

Q. In other words, this rate doesn't apply when the traffic goes Illinois Central to the south?

A. That is right.

Q. But a good deal of the grain that was shown in this exhibit that you showed to General Foods would be grain that went out to the south and therefore your exhibit to that extent would not be relevant to the rates here in question?

A. I don't agree with you on that because the preponderance of this business would move east, and if it moved south, the rate would not apply.

So I wouldn't see any point of using it.

Q. And some does move south?

A. If it does, they don't have the benefit of the reshipping rate on it.

Q. Exactly.

How much of the movement out of Kankakee either as [fol. 95] corn or corn products, what percentage goes out Illinois Central?

Mr. Murphy: Your Honor, we will have witnesses from General Foods Company which is the large miller at Kankakee who will be available to answer questions of that nature. At least they would be more properly directed to those witnesses than to this witness in the interest of shortening it.

Exam. Dahan: Does that satisfy you?

Mr. Hayes: Beg pardon?

Exam. Dahan: To have the answer to your question come from the shipper at Kankakee.

Mr. Hayes: Well, subject to the witness' answer to this question, if I may ask it.

Exam. Dahan: I mean what would be the purpose of trying to get it from him if he couldn't give you the exact answer because he can only talk for his own line, whereas the shipper could be able to speak as to all of the traffic that moved out of the point? So why can't you hold your question until the shipper is on the stand?

Mr. Hayes: I said subject to the witness' answer to the question I am about to ask.

By Mr. Hayes:

Q. Is all of the corn that you ship to Kankakee from Chicago shipped to General Foods?

A. No. Some of it may go to Indianapolis, Danville, and [fol. 96] so on, but all the cars shown in my exhibit are shown to Kankakee.

Q. Then I would have to ask this witness what percentage of the corn that moves out of Kankakee as whole grain or products goes via the New York Central.

A. I couldn't tell you what percentage except that General Foods is an industry on the New York Central and there are only two railroads in Kankakee, the New York Central or Illinois Central, so it would have to move out by the New York Central or the Illinois Central.

Mr. Hayes: I think you answered when you said you did not know the percentage.

By Mr. Hayes:

Q. Referring to your Exhibit 1, let us take as an example Streator. Did you, in preparing your exhibit No. 1, obliterate the lines of railroad running through points on your Kankakee Belt that also go to Chicago?

A. Yes, that is right. It was merely to make a cleaner exhibit out of it so that the New York Central stations could be portrayed more clearly with the river elevators.

Q. Follow me and I will try to cover this one quickly, sir, with one question, because it is material to me.

Is it true that lines of rail run to Chicago from the following points: From Streator, the C.B. & Q. and the Santa Fe?

[fol. 97] A. That is right.

Q. From Dwight the G. M. & O.?

A. Yes.

Q. From Reddick the Wabash?

A. That is right.

Q. From Lostant the Illinois Central?

A. Yes.

Q. While this 5½ cent rate of yours was in effect under temporary authority, how much corn or corn products did any of those railroads move to Chicago from those respective origins?

A. I don't know but I don't think they were moving any of it before and they are not moving too much now. So I don't know, that is something for those railroads to answer.

Mr. Murphy: He said he didn't know. I object to the question.

Mr. Hayes: I heard what he said.

By Mr. Hayes:

Q. Would you go so far as to say, as a man who was interested in developing traffic for your railroad, that while this 5½ cent rate was in effect, your understanding and impression was that those railroads moved practically no corn from those points to Chicago?

Mr. Murphy: I object to the question. He has already stated that he didn't know.

[fol. 98] Exam. Dahan: I think that is an answer to the question.

The Witness: Yes, I can tell you this, that the Illinois lines for many years, all of them, including the New York Central, have been trying to solve some scheme of rate making that would make us competitive with the barges. We have all been losing business and handling very little.

If you would like to have me tell you a little history on this—I will be glad to go into it.

Mr. Hayes: Mr. Examiner, may I have that stricken and have the witness answer the question I asked him?

Exam. Dahan: It may be stricken.

Mr. Hayes: Read it.

Exam. Dahan: I think he has answered your question, though, previously that he did not know, and I don't see how he can keep answering the same question if he doesn't know.

If he doesn't know, he doesn't know.

Mr. Hayes: He didn't know exactly, Mr. Examiner.

Exam. Dahan: If you want to subpoena the other railroads on the stand and have them testify as to whether or not they have been handling any traffic, you may do so, but as far as this witness is concerned, he says he doesn't know and we don't want to press the question.

Mr. Hayes: Very well.

[fol. 99] By Mr. Hayes:

Q. What percentage of your corn movement from Chicago to Kankakee was to General Foods?

A. I don't know. We haven't made any figures on it.

Q. Would it be the greater part?

A. Yes.

Mr. Hayes: I dislike to press this if the Examiner thinks it is not material, but I should like to know the witness' understanding as to what percentage it was.

The Witness: I don't know what the percentage is, but General Foods is a big transit operator at Kankakee with a corn mill at Kankakee.

By Mr. Hayes:

Q. I understand, and you don't know what the percentage is?

A. The corn that they draw from Chicago moving to Kankakee which I have shown on Exhibit M for a typical period is representative of the business moving to General Foods from Chicago.

Q. Now do you have any knowledge of what percentage approximately of your movement from Chicago to Kankakee would be your shipments to General Foods?

A. Percentagewise I can't give you a figure, although I would say it was close to 100 per cent.

Q. Thank you, sir.

Has it occurred during the period that this 5½ cent rate was in effect under temporary authority that you had orders [fol. 100] for empty grain cars in Chicago that you could not fill when the cars were asked for?

A. I think during this period all railroads had their difficulties with filling grain car orders.

I think that we did a very good job in filling our orders in the Chicago district contrasted to the other railroads.

I think when the grain starts moving in heavy volume, you just don't get the cars all in one spot and say "Well, here we have them all," but I think that overall we did a mighty fine job in keeping our people adequately supplied with cars during the year 1957 in the Chicago area.

Q. My dear sir, I am not criticising you, I simply asked you if there have been times when you were asked for empty grain cars in Chicago while this 5½ cent rate was in effect when you were unable to supply them because you didn't have cars?

A. There were and there were also times prior to the establishment of this rate when we had even more serious car shortages at Chicago.

Q. Would you say, then, that that was a rather chronic condition at Chicago for your line and others?

A. No, it is not a chronic condition. We supplied the cars to the best of our ability. When you get an order for 150 cars in one day, you just have to go ahead and assemble [fol. 101] those cars, and it may take two or three days to get them and maybe a week, all depending on the circumstances and the demand from all other elevators for cars.

Q. In other words, there is a pressure for empty box cars at Chicago, and you do the best you can with it, and in the periods I mentioned, and also theretofore, you have had difficulty in keeping up with the demand and other railroads have, too, for empty box cars at Chicago, is that true?

A. In 1957 the car shortages were not as acute as in previous years, so I wouldn't go along with the statement that we have had difficulty in furnishing cars.

There were periods maybe for two or three days where the supply of cars could not be furnished instantly, but

generally speaking in 1957, because of the way business has dropped and been dropping, and everything else, we have had the cars. The only trouble is we didn't have the loadings for them.

Q. Well, I understand that with the recession in business, the shortage was not so acute, but you realize, and frankly there was a car shortage pretty much coming along regularly of empty box cars in Chicago for you and other railroads.

A. What period are you talking about now?

[fol. 102] Q. I was talking about 1957 and for prior years.

A. Well, as to '57, my answer is the shortages were not acute in 1957 compared to '54 and—'56 and '55.

Q. But there were shortages?

A. I have answered this to the best of my ability, I think.

Exam. Dahan: That is enough. You don't have to go on. You have put in your answer. If he has other testimony or other facts that say something else, he can present them through his own direct testimony. Just answer the questions.

By Mr. Hayes:

Q. Does the New York Central sometimes transfer cars to which this rate has applied to other lines east of Chicago.

A. Oh, yes. Oh, east of Chicago?

Q. Yes.

A. You are talking about the combination of the proportional rate to Kankakee with the re-shipping rate from Kankakee via Chicago and east, is that what you are talking about?

Q. Let us take a shipment that starts on this Kankakee Belt and moves sometimes via Kankakee and sometimes via Chicago. That is correct, isn't it?

A. That is right.

Q. There would be a 54 cent proportional assessed by the [fol. 103] eastern carrier if it were different from the New York Central, if it went out of Chicago and went by a different carrier.

Now after—

Mr. Murphy: I object to that question, your Honor. It was clearly stated this morning that the 54 cent proportional rate on grain moving from the Kankakee Belt applies from Kankakee and not from Chicago.

Mr. Hayes: I think the witness understands my question.

By Mr. Hayes:

Q. Does the New York Central, having moved that car from Kankakee either directly east or from Kankakee to Chicago, ever transfer that car at some point intermediate to Chicago and New York to another line?

A. Yes, they are joint rates. They apply with the Lehigh Valley or D.L. & W. or whatever the routing might be in the tariffs.

Q. Say you move a car off this belt and this 5½ cent proportional applies and the car goes out of the hands of the New York Central at Indianapolis to another line for shipment on east either because of transit there or without transit there, however it may happen—does the New York Central under those circumstances get a division—

Mr. Murphy: Objection, your Honor.

Mr. Hayes: I haven't finished my question.

[fol. 104] By Mr. Hayes:

Q. —get a division of this 54 cents?

Mr. Murphy: Are you finished?

Mr. Hayes: Yes.

Mr. Murphy: I object to the question.

Exam. Dahan: Objection sustained.

We are not going to go into divisions in this case, so please don't frame any further questions as to divisions. That is a matter between the carriers; it is not a divisions case. This is not a matter for any of the protestants; it is between the carriers that are party to the rate. We don't have to go along and get into that subject at all.

Mr. Hayes: I understand the Examiner's ruling and I will abide by it, but I must make my own position clear on

the record by offering the evidence, however, and the only way I can do it is to ask the witness the question. I have asked the question. Do I understand the objection is sustained to the question?

Exam. Dahan: That is right.

Mr. Hayes: I would offer to show, then, that—

Exam. Dahan: You can show anything you want. If you want to argue that I possibly should let this evidence in, you can do so on brief, but I don't want any evidence in concerning divisions.

Mr. Hayes: I am not going to argue.

[fol. 105] Exam. Dahan: That is period.

Mr. Hayes: I am only going to make an offer of what the testimony would be if the witness were allowed to answer it.

Mr. Murphy: I never heard of making an offer of proof on someone else's witness, your Honor.

Mr. Hayes: Then you haven't been in the same places I have been.

Exam. Dahan: You make your offer of proof through your own witnesses, if you want to.

Mr. Hayes: My witness wouldn't know about this division business, your Honor; this witness does.

I offer to show what the witness would testify to if he were allowed to answer the pending question.

Exam. Dahan: You want to make him your witness now?

Mr. Hayes: For the purposes of that question which I have asked, I should like to make my offer of proof as to what he would say.

Mr. Murphy: I don't think you can split a witness' personality, Mr. Hayes.

Mr. Hayes: I have heard no objection to the offer of proof.

Mr. Murphy: I object.

I object to the offer of proof, your Honor.

[fol. 106] Exam. Dahan: You object, Mr. Murphy, to any offer of proof through your witness?

Mr. Murphy: I object to any offer of proof through my witness.

Exam. Dahan: The objection is sustained.

Let us have a five minute recess.

(Brief recess.)

Exam. Dahan: On the record.
You may proceed, Mr. Hayes.

Mr. Hayes: Mr. Examiner, I think perhaps you may be getting a little tired of the sound of one voice. I am going to let someone else ask the witness some questions.

Mr. Murphy: Off the record.

(Discussion off the record.)

Exam. Dahan: On the record.
You may proceed.

[fol. 107] Cross examination.

By Mr. Freeman:

Q. I have just a few questions, Mr. Tascik, in connection with your showing of movements. You did not show your movements for November of this year. Can you give us now or supply for the record the movements from the Kankakee Belt for the month of November, and if you have the movements for the month of December?

A. I don't have them with me.

Q. Could you supply them for the record?

Maybe I should address myself to counsel.

Mr. Murphy: I don't know whether he could get them or how long it would take him to get those figures together.

Would you have to make a study to get those?

The Witness: They would be readily available. I don't think we would have too much trouble.

Mr. Freeman: You may give them in the same terms you have given in carload quantities.

By Mr. Freeman:

Q. Just so there is no misunderstanding, I would like you to do it on the same basis you have shown both corn and grain, and I think it would be most relevant if you would

show merely your corn movements, but we want to be sure we are on a comparable basis here.

Mr. Murphy: To which exhibits are you addressing yourself?

[fol. 108] Mr. Freeman: In his Exhibit 13.

By Mr. Freeman:

Q. So we may be clear, is that corn or all grain?

A. That is corn.

Q. That is corn, and Exhibit 4 indicates it is also corn, is that correct?

A. That is right.

Q. And it is Exhibit 5 which is all grain?

A. All grain including corn.

Q. I think it would be most helpful to the record if you would give us all corn for the month of November if you can and for the month of December.

Now if you will turn to your Exhibit 3, please, am I to understand from this exhibit and your testimony that the competition you felt—

A. Wait a minute. I have the exhibit.

Q. Do I understand that the purpose of the exhibit together with your testimony is to show that your competition with the Illinois River began approximately in 1940?

A. That is approximately right. That is when we started feeling it.

Q. Now you have supplied us in the exhibit we have just mentioned, Exhibits 4 and 5, the rail movements from 1950 to 1956. Can you supply for the record figures which are comparable to those shown on Exhibit 3 from 1940 down to [fol. 109] 1956 so that we can have a comparable showing of the rail?

A. No, I cannot, and I can give you this explanation for it: Since 1940 many of these agencies along the west end stations have been closed, and whatever happened to those records, nobody seems to know. For that reason, if I had that information, I would have been glad to prepare an exhibit to show that at one time our west end stations were big factors in this grain movement. For the simple reason

that I just don't have the information, I just didn't put it in the exhibits.

Q. All right, Mr. Tascik.

You said that you thought that the New York Central was a big factor in this grain movement.

Now on what do you base that statement? You don't have the records and haven't been able to look at them, is that right?

A. From my common knowledge of the total grain movement on the Kankakee Belt during those years, I do have statistics showing the complete movement for the years 1940, and so on.

Q. Now what are those figures?

A. I don't have them here, but I mean there are such figures.

Q. What kind of figures do you have?

A. A total figure for the Kankakee Belt, the entire line [fol. 110] from one end to the other.

Q. For corn?

A. No, it is all grain combined, and of course it doesn't cover the West End Stations, it covers the entire railroad, the length of it.

Q. The East End and the West End?

A. Yes, a 200-mile haul, so I don't think those figures, that you would get much benefit out of them.

Q. But you make some assumptions based on them, I take it?

A. Oh, yes, we were factors in the grain movement in the old days.

Q. Based on the figures that you have for the whole Kankakee Belt east and west?

If that is the basis for your assumption, I would like to have those figures then so I may look at them to test your conclusion.

Mr. Freeman: Again I will address myself to counsel. May I have those figures?

Mr. Murphy: I have never seen them. If they are available I assume we will be willing to furnish them.

Mr. Freeman: From 1940 forward so they will be on a comparable basis. I think you should carry those figures from 1940 all the way to 1957, and then we would have something that would be a comparable basis.

[fol. 111] The Witness: The figures wouldn't give you much comfort or, rather, couldn't give any of us comfort because our East End handling is holding up pretty well because we don't have the water competition. When you take the entire length of the railroad, 200 miles, and you go ahead and say—if I could subtract or just give you the portion of the business for these particular stations, then I could go ahead and give you a true picture, but the way it is, I don't think it will do you much good.

By Mr. Freeman:

Q. The East End is not affected by barge movements and was not affected by barge movements, is that your position?

A. Yes.

Mr. Freeman: I would like to have the figures. It seems to me they are facts relevant to this record.

Mr. Murphy: We will see if we can gather the figures together and supply them if we can put them in any sort of an intelligent state for you, Mr. Freeman.

Exam. Dahan: Before the close of the hearing?

Mr. Murphy: Yes, we will attempt to do that if we can.

Exam. Dahan: All of the matters requested of this witness will be presented, I presume, before the close of the hearing. I have not authorized the late filing of any exhibits.

[fol. 112] You may continue, Mr. Freeman.

By Mr. Freeman:

Q. Mr. Tascik, does the rate here in issue apply via Chicago on the IC and west of Chicago to points in Central Territory or points east of Chicago in Central Territory?

A. I am not familiar with the routing of all of the carriers, except that I do know that generally speaking the New York Central rates do not apply via Chicago. NCTR Tariff 535-C to Central Territory destinations with the

New York Central Railroad as the origin line from these Illinois stations—

Q. But you are not familiar with whether it would apply via the Illinois Central from Kankakee to Chicago?

A. I wouldn't be able to tell you without the tariff. It is 535-C but you could probably establish that through your own witness.

Q. I would be delighted to.

Turning to your Exhibit 13, you show in terms of number of cars that Union Hill is your largest origin station, 388 cars.

Is there an elevator or elevators located at Union Hill?

A. To my knowledge I believe there is one there. I have a statement here somewhere.

No, I don't have the file with me, but as to whether there is an elevator there or not—

[fol. 113] Mr. Schier: Union Hill Elevator.

The Witness: Union Hill Elevator.

By Mr. Freeman:

Q. You have one shipper from Union Hill or do you have more than one shipper?

A. I don't know. All I know is that this was shipped from Union Hill. Whether it was one shipper or under one name or one consignor, I can't say.

Q. You show Streator, Illinois, as a point, only 26 cars. Is there an elevator at Streator?

A. Yes.

Q. What is the elevator at Streator?

A. I don't remember the names on all of them, on all of the elevators. There will be a witness later on that can probably tell you the names of all of these elevators that is actually in the territory.

Mr. Freeman: Will that be a New York Central witness, Mr. Murphy?

Mr. Murphy: No, not a New York Central employee but a witness for applicants.

By Mr. Freeman:

Q. You mentioned your local freight agents along the Kankakee Belt. How many freight agents have you on the Belt, and if you will, please tell us where they are located?

A. The open and free pay station list will show the following:

[fol. 114] These are the closed stations, Van's Siding, Lehigh—

Q. Just a minute, please.

A. Van's Siding, Lehigh, Reddick, Blair, Smithsburg, Sunbury, Budd, Missal, Priscilla, and Moronts.

Q. Do you have an agent actually located at those stations?

A. No, sir, we don't have an agent at those stations.

Now I will give you the stations at which we do have an agent.

Q. Thank you.

A. Union Hill, Dwight, Streator, Lostant, McNabb, and Granville.

Q. These stations are open seven days a week or five days a week?

A. I can't tell you. I know they go ahead and take care of the station business for their own stations and other stations. Whether they operate on five days or seven days I am not in position to tell you. I presume about five days, but a lot of them also have other duties incidental to the agent's work such as taking care of towers, or something, so of course it would be in that case a seven-day job.

Q. One employee at each one of those stations or more than one employee, one agent?

A. I don't know of any agents outside of Streator that [fol. 115] would have more than one employee.

Q. He is on a five-day week, eight hours a day?

A. That is right.

Q. At Streator you say the situation is different. How many are they? Are they around the clock at Streator?

A. Not from the standpoint of being local, supervising the agency work, that is, the billing, that would be strictly an eight hour a day job.

Q. How is transit policed at Kankakee? Is there an office at Kankakee that polices transit?

A. The transit at Kankakee is policed by the Eastern Weighing and Inspection Bureau.

Q. Which has an office at Kankakee?

A. I don't think they have an office there. They have an inspector.

Q. They have an inspector located at Kankakee?

A. Operating out of the Chicago office.

Q. Am I getting outside of your field or province when I talk about the transit policing, Mr. Tascik?

Is this outside of your area?

A. Yes, sir, you are. Transit policing is done by the Inspection Bureau.

Q. I wonder if you could tell us whether in addition to the processing plant at Kankakee, where the other substantial processors are located which is a destination for [fol. 116] this grain?

You don't need to give me the name of the person located there, but just the points.

A. Indianapolis, Danville, Paris—in fact, you could take any transit station in Central Territory.

Q. I am asking you the substantial ones as a result of your experience with this rate.

A. The three I have named—four, rather.

Q. In addition to Kankakee, Indianapolis, Danville and Paris?

A. Yes.

Q. This would account for substantially all of the corn all through the Kankakee Belt?

A. Oh, no, there are other transit operators all through CSA Territory. We don't control who buys the corn and who the ultimate transit operator will be. It could be Fostoria, it could be Toledo, it could be almost any point in the Central Territory. It is wide open for anyone who wants to use it in Central Territory.

Q. I am asking you as a result of your experience under this rate where the processors are located who are using this rate?

A. I have named substantially the movement is to Kankakee, Indianapolis, Danville and Paris.

Q. Does this corn go, as a usual proposition insofar as [fol. 117] the New York Central plays a part in the movement, to Kankakee or one of these other points for processing and then go to final destination, or does it get some transit in between?

A. In order to get the benefit of the five and a half cents proportional rates, it must be subject to a transit and milling application.

Q. And stopping for processing at one of these points would meet that test?

A. That test or any point where it is transit.

Q. I am asking if in addition to that within your experience, Mr. Tascik, it has been your experience that this corn either gets some intermediate elevation before it gets to a processor or whether after it is processed, it gets further transit before it gets to the ultimate destination?

A. Well, of course naturally some of it went into storage before going into transit for transit operation. Whenever you have any transit—grain is subject to storage in transit somewhere along the line.

Q. Is it at one of these points or some other point, for example take the man at Indianapolis, the processor at Indianapolis, is it your experience that the grain goes off the Belt to Indianapolis to the processor and is there stored, or are you suggesting it may be stored some place between [fol. 118] the Kankake Belt and Indianapolis?

Mr. Bradford: Wait a minute. We are going to have a witness to tell you exactly how it is done.

Mr. Freeman: I am just using this as an example.

The Witness: I don't think you will find any storage of grain between Kankakee and Indianapolis.

By Mr. Freeman:

Q. It wouldn't get an elevation storage?

A. No, sir.

Q. How about from beyond Indianapolis?

I am only using that as an example so we can be clear in our terminology as to what we are talking about here.

Is it your experience under this rate it will go from Indianapolis to ultimate destinations or will it receive a subsequent transit after leaving Indianapolis?

A. Well, I can answer the question in this manner, that all this grain or all this corn moves on a reshipping rate from Kankakee of 54 cents, and I am using New York as an illustration.

Now your question is if the grain goes to Indianapolis, is it transited there or stored?

Mr. Murphy: I don't think that is the question.

The Witness: I am just trying to give this as an illustration.

Mr. Murphy: I don't think that is—

The Witness: I want to use this as an illustration now. [fol. 119] If it is transited and moves on to New York, it is still the 54-cent rate. If you get this grain from Kankakee and you store it in Indianapolis and then it is transited somewhere intermediate, you get the 54-cent rate and then reship it out.

But there is no difference here than with the 54-cent rate applicable today on the reshipping rate.

By Mr. Freeman:

Q. I am not asking you about the tariff application which we both understand each other on. I am asking you about your experience under this rate as to how it is used.

A. My experience on the great majority of this grain is that it moved to Kankakee and was transited at Kankakee; it moved to Indianapolis and it was transited there; it moved to Paris and it was transited there; it moved to Danville and it was transited at Danville.

Q. And from those points it goes to ultimate destination?

A. To ultimate destination.

Mr. Freeman: That is all I wanted to—

Mr. Bradford: Let me ask one question to clear this up.

Mr. Freeman: Wait until I finish and you will have an opportunity on redirect.

Mr. Bradford: I want to clear up the term "transit." [fol. 120] When you say "transit," do you mean milling in transit?

The Witness: Milling in transit.

Mr. Freeman: That is what I meant.

By Mr. Freeman:

Q. You referred to a six-cent rate to Port Cargill in your testimony. Is that a local rate?

A. Yes, sir, it is, and the exhibit so shows it, I believe.

Q. In other words, there can be no subsequent transit, that is, no subsequent movement under that rate on a reshipping rate? You pay a full local out of there?

A. I don't know.

Q. There is no transit on that rate, let's put it that way?

A. No, but the rate can be added to any rate you have out of there. I don't know what your rate situation is out of Minneapolis. If you have reshipping rates, I don't know of any reshipping rates out of Minneapolis, but I do know this much, the six-cent rate would apply to Port Cargill and it can move out by water.

Q. Let's talk for a minute—maybe we can talk about water, if you like, for a minute, but let's talk about the rate that would be applicable out of Port Cargill to a destination by rail. Is there a pad requirement on that rate?

A. It is a local rate into Port Cargill and the rate would be in addition—or whatever your rate would be from Min- [fol. 121] neapolis would be in addition; it would play no part.

Q. It would be a local rate out of Minneapolis?

A. It would have no part. In other words, the transaction would cease once it got to Port Cargill.

Q. Does that rate include 212?

A. No, it does not.

Q. What other rates at this level have you been able to find, Mr. Tascik?

Mr. Murphy: I object to the question. He has prepared a number of rate exhibits here which he has submitted to give the reasonableness of the rate.

By Mr. Freeman:

Q. Is this the rate you are relying on so far as a comparative showing?

A. I am relying on all rates that the rate we established is a compensatory rate in relation to rates existing today.

Q. As shown on your exhibit?

A. That is right.

Mr. Freeman: That is all.

Oh, I do have one further question which is a matter of clarification.

By Mr. Freeman:

Q. If you will look at Exhibit 3 a moment, is it your understanding that the figures shown in Column 2 are movements not only that originated on the Illinois River but movements which may have originated at some other point [fol. 122] and moved via the Illinois River?

A. This is a statement of all barge shipments to Chicago irrespective of origin.

Q. So that this is not a showing limited to the movements originating on the Illinois River?

A. It is movements coming in via the Illinois Waterways.

Q. In other words, it is not limited to the points you show on your Exhibit 1?

A. No.

Mr. Freeman: That is all I have.

Cross examination.

By Mr. Chartrand:

Q. I would like to address my first question to your counsel.

We are here considering a Fourth Section Application No. 33955. Am I correct in understanding that there is the original application and only three amendments?

Mr. Murphy: That is my understanding also.

Mr. Chartrand: No other amendments are involved?

Mr. Murphy: No.

By Mr. Chartrand:

Q. Mr. Tascik, continuing with this Fourth Section Application, does it apply or seek relief on whole corn?

Mr. Murphy: I think that is a question that should be addressed to counsel. It is a legal document. It does so apply to whole corn, the application does.

[fol. 123] Mr. Chartrand: It does apply to whole corn?

Mr. Murphy: Yes.

Mr. Chartrand: Could you show me how that applies to whole corn?

Mr. Murphy: Well, it is an original application and three amendments. It may take some time. Do you want me to read the entire document, Mr. Chartrand?

Mr. Chartrand: The entire document goes, insofar as justification and direct reference, to whole corn and its movement via barge and rail, but insofar as the prayer or the relief sought, it is only confined to products of corn.

Mr. Murphy: I assume that that is something the Commission will have to dispose of Mr. Chartrand. We take the opposite view.

Mr. Chartrand: That it does?

Mr. Murphy: Yes.

By Mr. Chartrand:

Q. Now, Mr. Tascik, in listening to your direct testimony, constant reference is made to the competition that existed prior to the establishment of this five and a half cent rate as being a movement of corn to the river, thence barge to Chicago, and then subsequent rail movements to the East?

A. That is right.

Q. Now the rates, though, that have been published to [fol. 124] meet that competition, do they apply on whole corn?

A. No, sir, they do not.

Q. What do they apply on?

A. On corn for milling in transit.

Q. Corn for milling in transit. In other words, you are leaving undisturbed the long-existing rates on whole corn

and have put in a low combination of rates over Kankakee on products of corn, is that correct?

A. That is correct, and there was a reason for it.

Q. What is your reason?

A. We were concerned with this movement from stations and farms adjacent to our railroad going to the Illinois River, and we were very serious about what could be accomplished in recovering some of this business for the railroad, particularly as our Kankakee Belt line business was practically drying up, and we had very little business originating at these stations. We went to the elevators and the elevators told us that the only way we could get into the picture would be to make ourselves competitive.

Now that wasn't enough because after all we had to go ahead and find out what we were going to do if we were going to make ourselves competitive, who would get this business.

I think it is common knowledge that General Foods have a big corn mill at Kankakee and are big consumers of corn. [fol. 125] We went over to General Foods and said, "Why can't we get some of this corn right here from our own back yard, and here it is moving to Chicago and down to Kankakee and we can't get a pound of that corn through Kankakee."

They says, "When you make yourselves competitive with the barge route, we will give you assurances we will use your railroad. But first of all you have got to go ahead and place yourselves competitive."

We made the same investigation with some other transit operators and it all developed that here we had assurances from transit operators that they would use this rate if we made ourselves competitive.

Now mind you, over a period of years the railroads have been trying to figure out some means and ways of getting this barge competition. Obviously they felt that they couldn't make rates as low as the barge rates, and some railroads did attempt to put in rates, but they were twice as much as the barge rates and they weren't successful.

I gave some very serious consideration as to what the level of that rate should be, and I came to the conclusion

that if I was going to be successfully competitive with the barge lines, I would have to go ahead and establish a rate competitive with the barge rates to Chicago.

The question then arose, well, would that be a compensa-
[fol. 126] tory rate. When I figured out with these millers that I had the assurance of this business, that they would use this rate, and the traffic could use directly through Kankakee to the East without involving these absorptions at Chicago, here was a bona fide case where I was picking up five and a half cents additional, or five cents when I established this rate, than I would normally get on the reshipping rate from Chicago.

Now you may ask how I arrived at this five-cent rate in the first instance. The barge rate from Moronts to Chicago is five cents. The Territory that was seriously affected by barge competition were the stations west of Kankakee to and including Moronts. The reason I didn't go beyond Moronts is all I would have is paper rates because there are no elevators beyond Moronts.

So I stopped at Moronts, and the water rate or the river rate from Moronts to Chicago is five cents. I published a five-cent rate, or, rather, filed a proposal for a five-cent rate from Moronts to Chicago and I blanketed it and make the stations intermediate so as to carry the same rate, and that is the history why I first of all established a blanket rate of five cents, and, secondly, why I confined it to corn milling in transit, because that is the grain that I was primarily interested in recovering with the assurances that I had that
[fol. 127] if I had that rate, I could get the business for rail movement.

Q. So you only wanted to regain a portion of this traffic, this competitive movement?

A. A portion that meant a lot to the railroads. I tried to get as much business as I could. I am always interested in getting all the business I can.

Q. What is so attractive about the products of corn when you ignore completely whole corn and the predominant movement is whole corn?

A. Mr. Chartrand, I will agree with you right now that the same competitive conditions apply to whole corn as apply to corn milled in transit.

Q. Well, how do you justify the discrimination against whole corn?

A. I explained to you—

Mr. Murphy: I object. He hasn't said this was discrimination against whole corn.

By Mr. Chartrand:

Q. How do you justify the higher rate on whole corn than on products of corn, then?

A. I explained to you that when I started making this analysis and study, I had assurances from people that were going to use it, they were transit operators, they milled in transit, and I was looking to an end to go ahead and get some of this business for the railroad.

Q. Did you come to the Chicago people that merchandise [fol. 128] and deal in whole corn and ask them what they needed to give you a chance to compete for this business?

A. They had the rate so I did not contact them, but if you recall, this proposal was filed in regular fashion subject to publicizing with all the shipping trade and not one to my knowledge opposed the proposal before the rate committees.

Q. Do you remember the commodity classification of that application before those rate committees? What was the commodity involved?

A. Corn, five and a half cents to Kankakee.

Q. Corn?

A. As a proportional rate for milling in transit. It had a qualification in the proposal.

Q. Corn?

Mr. Murphy: He stated that it had a qualification, Mr. Chartrand.

By Mr. Chartrand:

Q. Well, is the New York Central and the Eastern railroads here seeking this Fourth Section authority here and a continuance of a higher level of rates on whole corn as against the products of corn?

A. As the rate situation stands today, that is the issue before the Commission.

If there is a demand or a request on the part of the Chicago people for opening up this rate to whole corn, [fol. 129] I am prepared to file such a proposal in the same manner as we have filed the proposal for the five and a half cents milling in transit rate for consideration of the Rate Committees, and for progress through the same channels.

Q. You make that upon a contingency, namely that a request be made. Has not a request already been made of the New York Central that it apply equally on whole corn?

A. A request has been made from the Board of Trade and I thought that in the interest of letting this case simmer down that it would be well to go ahead and hold that proposal in abeyance until we dispose of this case. However, if it is your wish that a proposal be progressed before the conclusion of this hearing, I will be glad to progress it.

Q. Before the conclusion of this hearing?

A. I mean the conclusion or before the decision in this case. I mean within the next two or three weeks, whatever it takes. It takes me a little time to work up a proposal. I would have to study the angles.

Q. Do I understand you correctly, then, that you would proceed immediately or, let us say, as fast as possible and without delay to take and correct that situation by making the five and a half cent rate applicable also in connection with whole corn?

[fol. 130] A. That is right.

Q. In your testimony, Mr. Tascik, you mentioned that you only went as far west as Moronts. Why did you stop at Moronts?

A. I thought I explained that, Mr. Chartrand. It would only be paper rates. There are no elevators beyond Moronts on the New York Central.

Q. Well, do I understand correctly, then, that all tonnage figures that you show as having originated on that line all came out of elevators?

A. Yes.

Q. None of it was loaded other than through a permanent elevator facility?

A. I don't know whether a man might have a—what do you call these things?

Q. Portable loaders?

A. Portable loaders. I don't know whether there was some portable loading when the elevators get filled up. Irregardless of whether we are talking about the five and a half cent rate or not, I see these portable loaders all over the railroad.

Q. They are in operation on the railroad today?

A. I see them at these various elevators. I see them right next to the elevator there. I see a portable elevator.

[fol. 131] Q. Loading cars?

A. Loading cars, yes, sir.

Q. If a permanent elevator facility is not essential for loading at a particular station, then again why did you stop at Moronts? Is it the mere fact that there were no elevators west thereof? That doesn't prevent loading of cars, does it?

A. I would like to take you on a tour of that territory between Moronts and Zearing, and you will find some of the most beautiful rock and hills and gullies and swamps that you have ever seen in your life. That is the reason for it. There is no corn in there—I mean along the New York Central.

Q. Well, of course, the corn could be grown back a few miles and loaded at these stations, Ladd, for example?

A. Yes, but if you will look at the map, what could we actually have beyond Moronts?

DePue is a railroad point there of interchange from the Rock Island.

Howe has a zinc company at that point and Seatonville, there is nothing there. From Seatonville to Zearing, the New York Central operates over TB&Q trackage rights, so that completes the railroad beyond Morents.

Q. If I came to the New York Central tomorrow with my portable conveyor and wanted to load a car at Ladd, would [fol. 132] you accept the car?

A. First of all, in order for you to put a portable conveyor on our railroad, you would have to lease the property.

Q. I would have to lease it?

A. Yes. We just don't let anybody come over on our property and put a portable loader there.

Q. Do you have a number of leases on that line there now?

A. I think there is one or two but I am not too definite about it. That is under the jurisdiction of the division freight sales manager in charge of that particular office.

Q. Is he going to testify in this proceeding?

A. No, he is not.

Q. Mr. Tasčik, at the time you went to your elevators to try and place yourself in a competitive situation, and I will refer to Dwight and stick to Dwight throughout my question, was the corn moving from the area of Dwight a shipping point on your railroad by truck to the river and then barge to Chicago and then rail to the East? Was that the competitive picture prior to the five-cent rate?

Mr. Murphy: May I hear the last question again, please?

(Question read.)

Mr. Murphy: I wonder if you could state your position on that particular issue. You stated it on another issue, Mr. Chartrand.

[fol. 133] Mr. Chartrand: Yes. My sole question is how was corn moving prior—how was the corn moving from Dwight, from an elevator on your railroad at Dwight, prior to the establishment of the five-cent rate?

The Witness: It is apparent that it was moving to the river, and I refer you to Exhibit 4 showing that the movement from Dwight—that the corn movement from Dwight amounted to 46 cars, and in contrast I want to refer you to Exhibit 13 to show you that we handled 244 cars from Dwight.

I think that that demonstrates that this grain must have been moving to the river because that is when we first got ahold of it.

By Mr. Chartrand:

Q. Well, then, in studying this subject, did those people at Dwight tell you how that corn had been moving?

A. Yes.

Mr. Murphy: If I may interrupt again, my question was you are directing questions against an issue entirely apart from the one you stated you took a position on at the beginning of the hearing, and I wonder if you might indicate what your position is on this issue that you are questioning on now.

Mr. Chartrand: I am just trying to develop the facts. We are talking about a time before the five-cent rate was established.

[fol. 134] Mr. Murphy: What is your position on the level of the rates, Mr. Chartrand?

Mr. Chartrand: On the level of the rates, I am against the level of the rate, and I am also against the fact which has been since cleared up somewhat of the discrimination against whole corn.

By Mr. Chartrand:

Q. Was it not a fact that the corn was being trucked from Dwight to the river and then utilizing barge facilities to Chicago for a subsequent movement by rail to the East?

A. Yes, I think the exhibits show that.

Q. And you sought to put your elevator at Dwight in a competitive situation or in an equal position to meet that competition?

A. Yes, I think we have.

Q. As close as you could?

A. We have a right—we have an inherent right to the transportation.

Q. But there was a primary truck movement from your elevator at Dwight to the river?

A. From that area, yes.

Q. Now that competition resulted in Chicago being the barge unloading point, did it not?

A. Yes, it moved by barge into Chicago.

Q. When you sought to meet this competition, you ignored [fol. 135] the point at which the competition unloaded the grain and put it back on the rails and picked a point like Kankakee over which to construct your rates?

A. I actually see nothing wrong in that, Mr. Chartrand. I have a right to meet my competition, and while you are

talking commercial aspects now, my interest centers entirely on what can I do for the New York Central Railroad, and in this particular case I was getting five and a half cents or five cents at the time this rate was established more than I got out of the rate through Chicago, and particularly when I had to take into consideration absorptions.

So to me with this movement that went to Kankakee and other points, certainly there was nothing selfish about it, all I wanted to do was to improve my financial position.

Q. There isn't any doubt in my mind, Mr. Tascik, but what you had the wholehearted interest of the New York Central at heart when you failed to consider Chicago, you failed to consider whole corn—

Mr. Murphy: I object to this as argument.

Mr. Chartrand: —and constructed it over Kankakee.

Mr. Murphy: There is no question.

May that be stricken, Mr. Examiner?

By Mr. Chartrand:

Q. Mr. Tascik, you referred throughout your testimony [fol. 136] about this McGraham formula, and I believe you indicated it had been in existence for a long time.

Under that formula were the through rates to the East equal to the Chicago combination?

A. From the intermediate points?

Q. From this territory west of Chicago here under that formula?

A. They were related to it, yes.

Q. Related to or were they equal to?

A. Well, I just don't understand you, Mr. Chartrand, on this point that now you are talking about through rates from the West End Stations that we are talking about, and we are talking about, for example, a destination like New York.

Q. Union Hill and West.

A. All right, and what are we talking now about, domestic rates?

Q. Yes.

A. There were no through rates. They were on a combination basis.

Q. Combination basis?

A. Yes.

Q. And later when through rates were established, they were equal to the Chicago combination?

[fol. 137] A. Yes, I think that is right.

Q. But under your present rates, they are not the Chicago combination?

A. No, they are not.

Q. It is a lower combination over Kankakee?

A. And a lower combination via Chicago, if you want to put it on the corn reshipped in transit.

Q. But the combination is over Kankakee, is it not?

A. Yes.

Q. On Page 8 of your statement you refer to Exhibit 9 and say:

"It will be noted from this comparison that the rates as of July 10, 1956, favored the rail-barge route from approximately eight cents to eighteen cents per hundred-weight."

Mr. Murphy: Do you mean Page 8?

Mr. Chartrand: Page 8 of the statement, yes.

By Mr. Chartrand:

Q. When you blanketed this whole line to five cents, didn't you do something more at some of the stations than just meet this competition?

A. No, I would say that I did not. The five cents was a blanket rate and it was obvious that I wouldn't establish anything lower than that from the intermediate points.

Q. Why did you blanket the whole line?

A. I explained that. I had to get a key to the rate ad-[fol. 138] justment. The barge rate from Moronts to Chicago was five cents and my furthest western station was Moronts, so actually my rate met the barge rate at Moronts and as I went east, my rate still maintained a five-cent level, even though the barge rates as they progressed closer to Chicago declined under the five-cent level.

Q. But did you not also testify that on the east end of the line around Union Hill that there was far less effect of the Waterway competition?

A. I testified that east of Kankakee we were not affected by water competition. I don't recall any time making a statement saying that from Union Hill I had no competition on the Illinois River.

Q. Was the competition just as keen at Union Hill as it was at Moronts?

A. I think the exhibits again, if you will refer to both of them—let's take them again. Exhibit 4 shows that in 1956 you handled 227 cars, and that was mostly CCC for export, and in 1957 you handled 388 cars from Union Hill in a six-month period, in half the time.

So therefore again it is evident that we had the water competition we were meeting.

Q. Did anything come to your mind when you saw the tremendous increase of that size in less than half a year as compared to your previous, that conceivably you were too [fol. 139] low in establishing your rate?

A. No. If I would have established rates even one penny higher than the rate I established, I would have found myself in jeopardy, the same as the experiences in the past; the adjustment would not have been successful in meeting barge competition.

The only way you could have met this barge competition was by meeting it and meeting like with like, and that is exactly what we did, and that is why it was so successful.

I would have been disappointed if we wouldn't have picked up the business we did on it.

Q. Well, like with like, I suppose you refer to the barge rate?

A. The barge rate, yes, sir.

Q. And you established a rail rate that was comparable?

A. Yes, and that was additional revenue in and above the 54-cent reshipping rate.

Q. Wasn't there a trucking factor from Dwight over to the river that you failed to consider there?

A. Isn't there a trucking factor from Dwight to the elevator on the New York Central?

Q. It is on the New York Central.

A. I know, but that grain has to come from a farm. It makes no difference if it goes to the river elevator or the

[fol. 140] railroad elevator, you still have trucking, Mr. Chartrand.

Q. Mr. Tasčik, you indicated you had a long rate legislative experience. Just how many rate matters have you participated in where the level of rates was made considering the distance or location of the producer's farm?

A. Not too many, I will tell you that right now.

Q. Any?

A. I don't know of any, no.

Q. You don't know of any, but here you are considering the location of this farm as an excuse for disregarding the trucking from Dwight to the river?

Mr. Murphy: I object to that question, your Honor. That isn't what the witness said at all.

By Mr. Chartrand:

Q. May I ask you this: You have disregarded the trucking from the Dwight elevator to the river?

A. Mr. Chartrand, I would like to have you refer to Exhibit 1, the territory south or the territory west of the New York Central. When we saw grain moving and crossing our railroad to the river, we started taking notice of the grain that actually should be going on our own railroad, which crossed our railroad and went down to the river. [fol. 141] Now in the territory between the river and the New York Central, I think that that area is just as much New York Central area as it can be river area, and the proximity of the farm in one case might be closer to the river and in another might be closer to the railroad. The trucking is there just the same, you have got to truck either to the river elevator or to the railroad elevator. You have got to get the grain somewhere.

Q. Well, what you set about to do was to put the elevator on your railroad in a competitive position to compete for this corn?

A. Oh, that is exactly the entire objective of the five and a half cent rate, and to give us some added revenue.

Q. In your Exhibit 11 or where you make reference to Exhibit 11 on Page 12 of your testimony you say:

> "It would naturally appear that we were making a 19½-cent reduction in this rate. This, however, is not true as the through rates on grain products are lower than the combination of local rates to Kankakee plus the reshipping rate beyond."

Now I am looking at Exhibit 11. Those destinations are in the CFA Territory?

A. That is right.

Q. But insofar as the 19½-cent rate reduction is concerned, that would be true to the Trunkline Territory, would [fol. 142] it not?

A. Yes, and that is why we didn't handle any business.

Mr. Legg: What was that last answer?

(Record read.)

By Mr. Chartrand:

Q. Then this 19½ cents you refer to, that would be a reduction from 25 cents under the present rates to five and a half?

A. Yes, sir.

Q. That is the extent of the reduction for the Trunkline Territory?

A. Yes, that is right.

Q. You made reference on Page 13 of your statement about car earnings of 1.58 cents per car mile. That is based on the weighted average distance, is it?

A. Yes, all of the shipments we handled during this six-month period.

Q. Which is about 38 miles?

A. 38.3 miles.

Q. How far is it from Moronts to Kankakee?

A. It is shown on one of the exhibits. Exhibit No. 13, the distance from—well, I don't have the distance. This was the actual—

Q. Would you take my word for it as being 83½ miles?

A. Yes, I will take that. That is about right.

Q. And the car mile earnings considering the mileage [fol. 143] from Moronts would be considerably less, would it not?

A. Yes, but if you will notice Exhibit 13 there, none of the corn moved from Moronts.

My Exhibit 13 actually reproduces the movements of corn on the five and a half cent rate for the first six months of 1957.

Q. Well, if I changed it to Granville, 79.3 miles, what would your answer be?

A. Well, my answer would be yes, and, by the same token, if you took Van's Siding, 5.2 miles, it would make a difference.

Q. In weighting the average based on a six-month experience, do you think that is long enough experience for you to say what the average haul is for business on that railroad or on that line of railroad?

A. I think that this is probably an average that wouldn't vary two mills less one way or another over the period of the next few years. This is a good illustration of what we can anticipate in the future.

Q. Of course, that will depend a great deal upon how many leases are forthcoming at certain locations on that railroad, wouldn't it?

A. I don't think that leases for portable loaders have much—I think in this business you know that it is the number of times you can clean an elevator out that probably [fol. 144] is as important as anything.

Q. You expressed an interest in avoiding wasteful transportation. Considering the mileage from Kankakee—from Chicago to Kankakee and to the East, do you consider the application of the proportional rates from Chicago or Kankakee via Louisville and Cincinnati to Buffalo as wasteful transportation?

A. I think it is very circuitous, but we all know that this corn moves or any grain under transit moves all around the world practically. In other words, we never have been successful in tying down our grain routing to specific routing. You know our routing to Trunkline Territory up to

this date today is still open, and those are some of the abuses we have today in this grain transit that we can move it almost anywhere through circuitous routes.

Q. Is not a great deal of that due to a commercial necessity? Do you not have customers and clients in Cincinnati that you would like to take care of?

A. I agree with you. After all, Mr. Chartrand, I hope you don't get the impression that when I talk about this rate from Chicago to Kankakee, that I said that I didn't want that business; but we were talking about it from an over-all picture, contrasting one to the other, what constitutes a more economic transportation characteristic com- [fol. 145] pared to another, and I think that is what we have outlined.

Exam. Dahan: We will take a five-minute recess.

(Brief recess.)

Exam. Dahan: You may continue, Mr. Chartrand.

By Mr. Chartrand:

Q. Mr. Tascik, there appeared in the New York Central's reply to various protests and petitions of suspension—the date of the reply is July 29, 1957, and it carried therein some movement figures from origins on its line of railroad into Chicago, Kankakee, and Indianapolis, and so forth.

Mr. Bradford: What page?

Mr. Chartrand: It would be Page 6.

By Mr. Chartrand:

Q. And also on Page 11 thereof it shows the corn movement for the first six months of 1957 by stations and by destination.

Do they truly reflect—excuse me, you do not have them in evidence here, but do they truly reflect the corn movement as they show in that?

A. Yes, they do. In fact, it is a consolidation of those figures in the exhibit. I don't have it in front of me, so I can't tell you exactly.

They are in my Exhibit No. 4.

Q. Exhibit No. 4?

A. Yes.

[fol. 146] Q. The reason I make a point of it, if they are in the exhibit—they are in Exhibit 4 in part, those shown on Page 11 insofar as the destination of the cars in the first six months of 1957, and on Page 6 insofar as the destination of the cars in 1954, '55 and '56,—that is not shown in your exhibit?

A. That is right.

Mr. Chartrand: Counsel, could we have those incorporated as part of this record to reflect the movement of corn for the period shown?

Mr. Murphy: I have no objection to having them incorporated in the record. However, if there are some slight variances, I mean, a car or two, it was because of the haste with which these were prepared back at the time when time was of the essence in preparing a reply.

I mean, if you just want it for showing the general picture—

Mr. Chartrand: The movement of corn for the period shown.

Mr. Freeman: Apropos that point, isn't this a part of the record, the application?

Exam. Dahan: It is a part of the record, but it is not in evidence.

Mr. Chartrand: Will it be agreeable with you if we put it in evidence?

[fol. 147] Exam. Dahan: If the parties are agreeable, we will receive in evidence all of the application, protests and the replies, but that is up to the parties.

Mr. Chartrand: Just exactly the way they read.

Mr. Murphy: No, I don't agree to that for the reason that we don't agree to everything that was said in the protests.

By Mr. Chartrand:

Q. Do those figures as shown in the reply reflect the actual movement of corn for the period shown?

A. Yes.

Q. Referring to your Exhibit 7, Mr. Tascik, you show barge loading points including Lockport, Joliet, and then the last three stations, Hennepin, Henry and Lacon. In the original Fourth Section Application you did not show those stations as barge loading points on which the application was submitted.

Why are they included here?

A. Because I had no knowledge that the volume of the movement that was moving through those particular ports—as you recall, this injunction was a pretty hurried matter, and all we could do was just assemble the ports that looked to be directly opposite our station.

Q. But this application was filed on June 28, 1957, far in advance of the court proceedings.

[fol. 148] The Witness: What is the question?

(Question read.)

The Witness: Yes, that is right.

By Mr. Chartrand:

Q. In Exhibit 5 at the head of the column headed "Location of Competing Elevators," there is a reference marked "No. 2."

These are the river points to which shippers along the New York Central listed in the first column normally truck their corn because of better price quotations on account of lower shipping costs via barge as compared to applicable rail rates via Kankakee.

There you only considered river loading points from Moronts through Greenwich.

In your Exhibit 7 you include Lockport, Joliet, Hennepin, Henry and Lacon.

A. Because by the time this case was set down for hearing, I had additional time to develop the effects of Joliet, Lockport, Hennepin, Henry and Lacon, and they were just as much competitive with those ports—probably not in as great a volume as we are with the five other ports listed.

Q. From what developed there, was there trucking, let us say, from Union Hill or Reddick to Lockport rather than the shorter distance to Morris?

A. Well, I can't tell you where the farmer trucked his [fol. 149] grain, whether it was to Morris or Lockport, but the distance, you will probably notice from Exhibit 2, there isn't too much difference, and I don't know if the barge variables of three and a half, three and a quarter, three and three quarters and four and a quarter, influenced the movement via Lockport or Morris. Somebody that knows more about the trucking or those movements will have to qualify that.

Q. Mr. Tasčik, in your Exhibit No. 14, you set out the switching costs or absorptions at Chicago. From there on your exhibit lists switch lines served such as the Chicago Junction, the Indiana Harbor Belt, and the Chicago River and Indiana Railroad as lines to whom the absorption was paid. Is that correct?

A. That is correct. The elevators are located on those railroads.

Q. Does the New York Central have a proprietary interest in those three switch lines?

A. Yes, the New York Central has.

Q. To what extent do you have an interest in the Indiana Harbor Belt?

A. We have a 60-percent ownership in the Indiana Harbor Belt.

Q. Sixty-percent ownership?

A. Sixty.

[fol. 150] Q. And in the Chicago Junction?

A. The Chicago Junction is leased to the CR&I and the CR&I is owned by the New York Central.

Q. Your subsidiary lines, how do they feel about a reduction in their revenues to the extent that you by-pass Chicago and eliminate this revenue to them?

A. Well, you say "by-pass Chicago." I think that when you want to approach this realistically, you can by-pass Chicago with the Kankakee Belt, and you can by-pass Chicago with the EJ&E, and you can by-pass Chicago with

any number of routes. It is just a matter of traffic availability for these lines.

Q. The fact that you pay about two cents a hundred out for this switching absorption is not a dead loss, though, to the New York Central, it being a proprietary line such as they are?

A. No, but I can tell you that the CJ and CR&I is a million and a half dollar deficit operation each year.

Q. Now referring to Exhibit 15, you show some circuity, and a statement showing comparison of distance from Chicago via the New York Central through Kankakee to Albany, New York. Is that 4.24 percent circuity?

A. Yes, sir.

Q. That is not very much, is it?

A. No, but still it is circuitous. It just shows that there [fol. 151] is additional mileage when the cars are handled from Chicago to Kankakee versus West End stations to Kankakee.

Q. You don't make a big point of circuity on grain when it amounts to a little over four percent, do you?

A. It is merely here to show that there are transportation savings through the inauguration of the five and a half cent proportional rate and this mileage is just one of the factors in it.

Q. On the six-cent rate to Port Cargill, do you know if that is an intrastate rate?

A. Yes, sir. I do know that it is.

Q. You indicated that for the first six months in 1957 of the cars to Chicago, the predominant part of them was CCC grain, is that correct?

A. What period was that again?

Q. The first six months of 1957?

A. Yes, that is right.

Q. Is that grain that was routed under Government control and you would have gotten it in any event?

A. Yes, sir.

Q. Does this Government grain move via barge?

A. I don't know. I don't think so, but I couldn't say how it moves. It is grain, I mean, all of it. I know that—all I know is the way the CCC grain moves over the New York [fol. 152] Central.

Q. Would that be predominantly rail?

A. That is predominantly rail, yes.

Q. You established here about what percent came into Chicago as CCC grain, the difference being about 20 cars or so of free corn?

A. That is right.

Q. Now with regard to the movement into Kankakee from this Belt Line, how much of it was CCC corn?

A. I don't think any of it moved to Kankakee that was CCC corn. Most of it went to Chicago.

Q. The corn that does go to Kankakee to General Foods is the free corn—in other words, other than Government corn?

A. Yes. At least to the best of my knowledge—I don't know. You will have to develop that from General Foods. They will have a witness.

Q. I am just asking insofar as your knowledge is concerned.

How about CCC corn to Indianapolis?

A. I don't know what the proportion is of the grain moving on Government corn to the interior points from this territory. That is, out of the 2400 cars we handled, I don't know what the proportion is, but I can say this much, if the corn was not subject to milling the five and a half cent rate [fol. 153] is not applicable.

Q. I understand that.

How about to Paris, Illinois? Is that CCC corn?

A. Not that I know of. It is strictly going to a transit operator at Paris.

Q. How about Decatur?

A. The rates do not apply from Kankakee to Decatur.

Q. I should say Danville, excuse me.

A. A transit operator.

Q. Free corn?

A. I would say free corn to the best of my knowledge. It is corn, that is all I know.

Mr. Chartrand: That is all. Thank you.

Exam. Dahan: Mr. Erickson?

Mr. Erickson: No questions.

Exam. Dahan: Any redirect?

Mr. Murphy? I have a few questions, your Honor.

Supreme Court of the United States

OCTOBER TERM, 1962

No. 58

A. L. MECHLING BARGE LINES, INC., ET AL., APPELLANTS,

v.

UNITED STATES, ET AL.

No. 59

BOARD OF TRADE OF THE CITY OF CHICAGO, APPELLANT,

v.

UNITED STATES, ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

FILED JANUARY 18, 1963

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Redirect examination.

By Mr. Murphy:

Q. Now—

A. Can I answer Mr. Hayes' question here he wanted to know about Exhibit 19?

Q. Yes.

A. As to the barge operators used in compiling our statement, the Mechling figures include Mechling Company and Marine Transit Company which I understand has been [fol. 154] absorbed by Mechling.

The page three statement about barge lines other than Mechling, they would be Blaskey, Inc., Mississippi Valley Barge and Ohio River Company.

By Mr. Murphy:

Q. Mr. Tascik, Mr. Hayes in cross examining you, questioned the fact that the rate from Kankakee applied via a circuitous route to New York through Paris, Danville and Indianapolis.

Can you explain how the routes from Chicago on the re-shipping rate applied through those stations?

Do routes from Chicago on the re-shipping rate apply through those stations?

A. They do, yes, in the same manner as they apply from Kankakee.

Q. Would those routes from Chicago be more circuitous than the direct routes to the east?

A. Yes, they naturally would be to some extent. Probably not as great as I have indicated in Exhibit 15, but they would be circuitous.

Q. Comparing the routes from Kankakee through those stations with the routes from Chicago through those stations to eastern destinations such as New York, which of the routes would be the more circuitous?

A. It would be from Chicago.

Q. Mr. Hayes questioned you about whether or not the [fol. 155] other eastern railroads had considered the effect

of this rate on their revenues. I ask you was this rate docketed with the rate committees?

A. Yes, it was.

Q. What rate committees?

A. Illinois Freight Association.

Q. Can you indicate what the names of the major railroads that belong to that committee are, sir?

A. Well—

Q. That is, major eastern railroads.

A. Practically every railroad that operates in the state of Illinois; among the western lines would be the C.B. & Q., the Rock Island and C. & N. W., and among the eastern lines would be the Wabash, the New York Central, the B. & O. and Nickel Plate.

Q. Would the Pennsylvania?

A. The Pennsylvania would belong to the committee, yes.

Q. Did those railroads have an opportunity to consider whether or not they would join in the rate?

A. They certainly did, and the rate is published as a joint rate.

Q. They concurred in the rate?

A. Yes, sir.

Q. Mr. Tascik, some indication was given to the effect that the barge transportation was to Chicago and you were [fol. 156] queried as to why you established the proportional rate to Kankakee to meet that barge transportation.

Will you explain how that affected you?

Mr. Hayes: May I have the question?

(Question read.)

Mr. Hayes: I thought the witness had made quite a speech on that. I don't know why we have to have it again.

By Mr. Murphy:

Q. Can you answer the question?

A. It was principally to meet the competition of the barge-rail route.

Do you want me to go into a recitation of the facts that led up to it?

Q. Not the facts that led up to it, but why did you make a proportional rate to Kankakee to meet the barge rate to Chicago. What factors affect the barge-rail movement that brought the barge competition to Kankakee?

A. I still don't understand your question.

Q. All right, I will withdraw the question.

By Mr. Bradford:

Q. Mr. Tascik, in answer to a question, you stated that corn via Chicago was for transit. Now again I would like to ask you if that corn on the five and a half cent territory is not for milling?

A. For milling in transit, sir.

Q. Wherever you mentioned transit in connection with these rates, you mean milling in transit?

[fol. 157] A. That is right, that is the way it is published in the tariff.

Q. The reason I am asking that, several times in the record you mentioned "transit."

Now something was said about the export rate and a comparison with the rates here under consideration. Now is this five and and a half cent rate standing by itself a rate?

A. No, it is not.

Q. I will put it this way, isn't it part of a through rate?

A. That is right. It cannot be used without the addition of a through rate beyond, a re-shipping rate.

Q. So any comparison of the five and a half cent rate with some other rate, a local rate, is not comparing like with like, is it?

A. That is right.

Q. Is the proportional rate from Chicago to the east applied by other lines than the New York Central Railroad?

A. Yes.

Q. And any of this five and a half cent billing that ultimately arrives in Chicago can move out on any other line that participates in the proportional rate?

A. If there is routing, and there is, yes.

[fol. 158] Q. Now something was said about this 13 cent division you received between Kankakee and Chicago when

the movement is on a proportional rate on Kankakee. If you didn't publish this five and a half cent rate and get the grain in the box car, would you get 13 cents between Kankakee and Chicago on that grain?

Mr. Hayes: I can't hear the question.

Exam. Dahan: Read the question.

(Question read.)

The Witness: No, I would first have to have an initial movement from the country origin to Kankakee.

By Mr. Bradford:

Q. Is there any rate to the south from Chicago that routes via the New York Central Railroad and the Illinois Central at Kankakee? Does anybody publish rates by such a route?

A. Not to my knowledge.

Q. Isn't it true other Illinois lines have proposed reductions in the corn rates to Chicago to meet barge line competition?

A. Yes, there are several proposals filed.

Q. Do you know the present status of those proposals?

A. They are still pending before the committee.

Q. Now you were asked where the processors are located and you mentioned Kankakee, Indianapolis, Danville and Paris.

[fol. 159] Now isn't it true that corn can move to Indianapolis, Danville or Paris and move out as corn as long as it is transited at Chicago—at some other point, milled?

A. That is right. That is what I tried to bring out in my testimony. The transit point could be anywhere in official territory.

Q. You can transit in and out of corn as long as the ultimate transit is milling?

A. That is correct.

Q. And that permits a man other than the miller at any one of these points to buy corn and sell it to a processor, is that right?

A. That is correct.

Q. And get the benefit of the five and a half cent rate?

A. That is correct, subject to milling in transit as the tariff now stands.

Q. You mentioned a conference with General Foods regarding the five and a half cent rate and its application on whole corn—withdraw that.

You mentioned a conference with Chicago on the application on whole corn. Isn't it true that you also have a conference in Indianapolis on the same proposition?

A. Yes, sir, I did.

Q. And your answer to the Indianapolis is the same as it was to Chicago?

[fol. 160] A. That is correct.

Q. So you would consider making a proposal to have it apply to whole corn?

A. That is right.

Q. You still stand on that proposition?

A. Yes, I do.

Q. The only thing now that is holding it up is pending the decision in the case that is now before the Commission?

A. Well, that is what I would like to do is have it held up, but if Mr. Chartrand wants me to progress this prior to the disposition or decision in this case, I will be glad to file a proposal.

Q. Didn't Indianapolis agree to hold it up until after?

A. Yes, they did, and I think it is still advisable to hold it up until this case is decided.

Q. Can you see any difference in trucking grain from the farm to a river elevator and trucking grain from a railroad to a—from a farm to a railroad elevator?

A. I can't, no.

Q. Is it a necessary operation?

A. It is a necessary operation.

Mr. Bradford: That is all.

Recross examination.

By Mr. Legg:

Q. Mr. Tascik, do you tell me the direct rail mileage via [fol. 161] the New York Central from Chicago, Illinois to the destinations listed on your Exhibit 15—

A. They are available but I don't have them right here with me now.

Q. Would you supply them for the record?

Mr. Murphy: Mr. Examiner, those direct rail mileages are published in published tariffs. Now we have a number of requests here to furnish information today, and we have attempted to be cooperative, but I am afraid it is beyond the physical capacity of Mr. Tascik to furnish that so I think we will decline that.

Mr. Legg: Would counsel then stipulate with us that we could refer to the tariffs or to the Railway Guide and form those mileages and put them into the record?

The Witness: Not the Railway Guide.

Mr. Murphy: No, I think you can put them in with the proper tariff authority just as Mr. Tascik would have to obtain them. I am sure that if you want advice as to how to obtain them, he will be happy to tell you what tariffs to go to.

Mr. Legg: I will renew my question or request, then, for the information from Mr. Tascik and ask for a ruling.

Exam. Dahan: I am not going to direct him to furnish anything that he does not want to furnish. Now you have the tariffs available to you, you can make your own deter-
[fol. 162] mination of the direct mileage if you want to present them in evidence through your own witness, or if you want to, we will incorporate them by reference, those tariffs which name the mileage, and you may determine the mileages yourself.

Mr. Legg: That will be satisfactory.

By Mr. Legg:

Q. Mr. Tascik, will you specify the tariffs from which we can determine these mileages?

A. Well, the New York Central mileages would be in the New York Central mileage tariff.

Q. What is the number of that?

A. I don't know, but it is available in our office. It is a public tariff filed, and if you don't have the mileage tariffs, you can come in there and check them out any way you want.

By the way, they are on this mileage authority, P & LE, N.Y.C., take them off of Exhibit 15. They are on there.

Q. I beg pardon?

A. The mileage tariffs are shown on Exhibit 15.

Q. ICC-LS-1536-NYC-16802 and 8515?

A. That is right.

Q. You have told us the B&O ICC 9227 also?

A. That is right. I will be bighearted, you can use our tariffs.

Exam. Dahan: Let me ask you this, what are these dis-
[fol. 163] tances that are shown on Exhibit 15? Are they direct distances?

A. These are distances, your Honor, that move from Chicago via Kankakee, Illinois because the rate operates through Kankakee, contrasted with the distances from the West End Stations using the weighted average—the average weighted mileage of 38.3.

Exam. Dahan: What does he want the distance from?

The Witness: He wants the distance from Chicago.

Mr. Legg: Direct from Chicago.

Exam. Dahan: Oh, without going through Kankakee. You can get that from the tariffs listed in that exhibit.

The Witness: That is right.

By Mr. Legg:

Q. Mr. Tascik, one question. What are the railroads to the best of your knowledge that have made proposals to reduce corn gathering rates in the Illinois region?

A. Northwestern, Rock Island, and I believe the Alton has filed one or is going to file one, but there is about 3 or 4 railroads altogether.

Q. You say those proposals are pending before the committee? What committee is that?

A. The rate committee, Illinois Freight Association.

Q. How long have they been pending?

A. They are not my proposals so I don't know the exact date when they were filed.

[fol. 164] Q. Approximately?

A. Probably 2 or 3 months, four months.

Q. Do you know about what rate level they are seeking to establish?

A. I know what the proposed rates are, sir, if I had the proposal here, but you have got to bear in mind the distances involved and the characteristics of the movement.

I am not in position to speak for the other railroads on their level of rates they are proposing.

Q. Roughly, say from Dwight to Chicago via the G. M. & O., what would the rate be that has been proposed?

A. I don't know.

Exam. Dahan: I wonder why we're getting into this subject? If we did know what was proposed, it would mean very little; the proposals may not even come up before the Commission for decision. They may never be established.

So why go into it all here? We only want real evidence—it may be real, but we have too much pertinent evidence to be taking in the whole field.

Mr. Legg: I was only clarifying Mr. Bradford's question, your Honor. I am sorry.

Mr. Bradford: Your Honor, my questions showed the New York Central was doing the things the other railroads were doing to try to meet competition, that is all.

[fol. 165] Mr. Hayes: If that was the purpose of Mr. Bradford's question, it might be interesting to know what level of rates the other railroads considered to be necessary to meet competition from Dwight.

Exam. Dahan: Do you have any other questions?

Mr. Legg: I think not.

Exam. Dahan: Do you have any questions, Mr. Hayes.

Mr. Murphy: Now—

Mr. Hayes: Yes.

Mr. Murphy: This is recross examination. Are we going to go around twice on this?

Exam. Dahan: That is all I want to get is recross examination.

Mr. Hayes: This is strictly relevant to the cross examination and the cross examination only. I shall address myself to that.

Mr. Legg: If you want citations to all of my questions, I will give them to you on your questions on redirect.

By Mr. Hayes:

Q. The witness was cross examined about whole corn and products—

Mr. Murphy: Now, Mr. Examiner, this is not a question on redirect that I can see.

Exam. Dahan: That is what I expected. You say he was cross examined on it.

Mr. Hayes: He was, he was cross examined by another [fol. 166] interest after I had concluded.

Mr. Murphy: If we are going to have recross on the cross examination—

Exam. Dahan: What side are you on now?

Mr. Murphy: Well—

Mr. Hayes: There is more than one interest on each side of the table, Mr. Examiner.

Exam. Dahan: You mean you have questions which would be cross examination to the questions that were put by the Chicago Board of Trade, is that what you have?

Mr. Hayes: I have one question. Perhaps if I can ask it and it is specific, you can rule on it more readily.

Exam. Dahan: Very well. You may ask the question.

By Mr. Hayes:

Q. Is it a fact that this grain which you are trying to get away from the barge lines, whether it goes to Chicago by barge line or whether it goes to Chicago or to Kankakee by railroad, will go that far as whole grain?

A. Yes.

Mr. Hayes: That was all I had along that line, Mr. Examiner. Was that all right?

Exam. Dahan: That is okay.

Mr. Murphy: You didn't live up to your reputation.

Mr. Hayes: I have, I might say, other questions relating to the redirect examination of this witness by railroad [fol. 167] counsel.

By Mr. Hayes:

Q. These routes that you referred to, Mr. Tascik, from Chicago to the east as being more circuitous than the routes from Kankakee, were those routes from Chicago that you were referring to routes over the New York Central line only?

A. Yes, the movement was from Chicago to Kankakee, New York Central routes, yes.

Q. You referred to the submission of this rate proposal to the rate committee or rate bureau of what, was it the Illinois Traffic Association?

A. Illinois Freight Association.

Q. Illinois Freight Association, and do they act by majority vote?

A. Yes, they do.

Q. Was the vote unanimous?

A. Now what are you talking about, the whole corn we propose to file or the five and a half cent corn rate?

Q. I think my question is sufficiently, to quote the witness, direct and specific to deserve an answer on its own terms.

Mr. Murphy: Perhaps you could be helpful to him in that he obviously does not quite understand what you are talking about.

Mr. Hayes: I ask the witness to answer my question.

[fol. 168] Exam. Dahan: Is there an objection to this question?

Mr. Murphy: The witness indicated that he didn't understand the question and I respectfully request Mr. Hayes to rephrase it.

Mr. Hayes: Oh, he did.

Exam. Dahan: Do you understand the question?

The Witness: I can't—I don't know which rate he is talking about.

Exam. Dahan: You would like to have him rephrase it?

Mr. Murphy: Yes, your Honor.

Exam. Dahan: Would you please do so?

Mr. Hayes: I don't know how to rephrase it, Mr. Examiner. I have asked my question. I would like to know the answer.

Exam. Dahan: Well—

The Witness: Read the question, please.

(Question read.)

The Witness: The vote on the five and a half cents rate was an approved record. As you know, the voting is by ballot. I don't know if it was unanimous or not. It was approved, however.

By Mr. Hayes:

Q. You wouldn't know how the ballots ran on it?

A. That is right, except that the majority favored the establishment of the rate.

[fol. 169] Q. Or what railroads voted for it or what railroads voted against it?

A. No, I don't know.

Q. I think you stated in answer to Mr. Bradford's question on redirect examination that other railroads serving this origin area into Chicago had made proposals the last three or four months to reduce their rates to meet barge competition. How long ago did you make your proposal?

A. My proposal was filed some time in July 1956. I don't have the papers here with me.

Q. Since that time while your rate has been in effect, as you pointed out, these other lines haven't been getting any business into Chicago?

A. Not since—

Mr. Murphy: He didn't so state, as the record will so show.

Mr. Hayes: The record will show whether—

Mr. Murphy: He did not so state, and I object to the question.

Mr. Hayes: The record will show.

By Mr. Hayes:

Q. Wouldn't you say the proposals of these other railroads to reduce their rate might easily be to meet the New York Central's competition?

A. They specifically say they are meeting barge competition.

[fol. 170] Mr. Hayes: I am asking what you say.

The Witness: I am saying what the proposals state.

Mr. Hayes: I know you are. What do you say?

Mr. Murphy: Do you think the proposals are correct, Mr. Tascik?

The Witness: I think the proposals are absolutely correct.

Mr. Hayes: That is all.

Exam. Dahan: Mr. Freeman?

Mr. Freeman: I just have a couple of questions.

Recross examination.

By Mr. Freeman:

Q. I want to get clear on the record this proposal. Am I to understand that the first time this proposal of a five and a half cent rate came up before the IFA committee, that it was approved?

A. It was approved by the IFA executive committee.

Q. Yes, but that was on appeal, was it not?

A. On appeal to the executive committee.

Q. Now what happened at the initial stage, was it approved or disapproved?

A. It was either continued on the docket or disapproved. I think it must have been disapproved to be appealed.

Q. And was appealed?

A. To the executive committee, but that is usual procedure.

[fol. 171] Q. But it was disapproved the first time, is that correct?

A. That is right.

Mr. Freeman: I have no—oh, I have one with respect to Mr. Bradford's questions concerning the trucking to the river.

By Mr. Freeman:

Q. If I understand your testimony, and I want the record to be clear on this point, if I understand your testimony this rate was initiated because you saw grain being trucked from Dwight and other points on the New York Central to

the river and from points out there to the river, and you were trying to meet that competition?

A. That is right.

Mr. Freeman: That is all.

Mr. Chartrand: No questions.

OFFERS IN EVIDENCE

Exam. Dahan: Any objection to the receipt of exhibits 1 through 21 inclusive?

With no objection, they may be received.

(Applicant's Exhibits 1 to 21, Witness Tascik, were received in evidence.)

(Witness excused.)

Exam. Dahan: We will recess until 9:30 tomorrow morning.

(Whereupon, at 5:00 o'clock p.m., an adjournment was taken until Thursday, January 30, 1958, at 9:30 o'clock a.m.)

[fol. 174] PROCEEDINGS OF JANUARY 30, 1958

Exam. Dahan: Come to order, please. Are you ready?

Mr. Murphy: Yes, your Honor. I would like to call as our next witness Mr. Reynolds.

THOMAS E. REYNOLDS was sworn and testified as follows:

Direct examination.

By Mr. Murphy:

Q. Will you state your name?

A. Thomas E. Reynolds.

Q. What is your position and business address?

A. Division Superintendent, West and Western Divisions, The New York Central Railroad Company, LaSalle Street Station, 139 West Van Buren Street, Chicago 5, Illinois.

Q. How long have you been employed by the New York Central Railroad?

A. Eleven and one-half years.

Q. Please describe briefly your duties and responsibilities.

A. The territory which I supervise is outlined on my Exhibit No.—

Mr. Murphy: Mr. Examiner, may we have marked for identification the next exhibit which is a large blueprint map?

Exam. Dahan: It will be marked as Applicant's Exhibit No. 22.

[fol. 175] (Applicant's Exhibit 22, Wit. Reynolds, marked for identification.)

By Mr. Murphy:

Q. Will you proceed?

A. The territory which I supervise is outlined on my Exhibit No. 22 which is a detailed map of the West and Western Divisions. I am division superintendent in charge of transportation, maintenance of locomotives and cars, tracks and buildings, police and stores departments for the West and Western Divisions.

This territory extends from Chicago, Illinois through Elkhart, Indiana; Chicago through Niles, Michigan; Chicago to Danville, Illinois; South Bend, Indiana to Zearing, Illinois; East Gary, Indiana through Joliet, Illinois; and Niles, Michigan through Benton Harbor, Michigan.

Q. Is that portion of the New York Central System sometimes referred to as the Kankakee Belt shown on your Exhibit No. 22?

A. Yes, the Kankakee Belt is the line between South Bend and Zearing via Kankakee. It is a cut-off route around Chicago that avoids the congestion and difficult operating conditions in the Chicago Terminal area.

Q. Are you responsible for operations on the Kankakee Belt?

A. Yes.

[fol. 176] Q. Do you have a list of the grain elevators in Chicago, Illinois?

A. Yes, a list of grain elevators in Chicago, and the information as to the railroad serving each of the elevators is shown on my next exhibit which has been marked for identification, Exhibit No. 23.

Mr. Murphy: May we have it so marked?

Exam. Dahan: It may be. The list of elevators will be marked for identification as Exhibit No. 23.

(Applicant's Exhibit 23, Wit. Reynolds, marked for identification.)

By Mr. Murphy:

Q. Are you responsible for the furnishing of grain cars to the elevators on the West and Western Divisions?

A. Yes.

Q. What is the source of empties for loading at elevators in Chicago for line haul movement from Chicago via the New York Central?

A. These empties are supplied as requested by the grain elevators. These cars are furnished from various locations where cleaning tracks are in operation; namely, Elkhart Yard, Indiana; Englewood Yard, Illinois; and, at times, Kankakee Yard, Illinois.

This depends upon the flow of empties, the cleaning tracks capacity, and demands from these cleaning tracks. [fol. 177] The Elkhart operation is such that it is a central point for distribution of cars from the east. On orders these cars are sent to the point which will place the cars at the elevators.

Q. Mr. Reynolds, will you indicate where on the map we could find the Elkhart yard?

A. Yes, sir.

Q. That is Exhibit No. 22 that I referred to as the map?

A. Yes, on Exhibit 22 it is in the upper right hand corner immediately adjoining the borderline just below the Michigan-Indiana state line, just south of the Michigan-Indiana state line.

Q. Would you locate Englewood Yard for us?

A. Englewood Yard is the first station south of Chicago along Lake Michigan.

Q. And Kankakee Yard?

A. Kankakee is in the center of the map. It is west of the Illinois-Indiana border on the Kankakee Belt route which is the east-west route in the center of the map.

Q. Please describe the operation of supplying and placing cars for loading at elevators served by the New York Central in Chicago.

A. The cars for the elevators known as Columbia and Schwill are handled directly from Englewood Yard, with other cars for these elevators and other industries by a [fol. 178] yard crew to the East Chicago Yard.

There the empty grain cars are switched out by this yard engine and subsequently placed by this engine in the elevators. Cars for Elevator J and the Kensington elevator are delivered by the New York Central crews to the Indiana Harbor Belt Railroad, are switched by this Belt Line into a Kensington group. These empties, mixed with other cars for Kensington Yard, are hauled from Gibson Yard to Kensington.

The empties are switched out and placed at these elevators for loading.

Q. Please describe the operation of supplying cars for New York Central movement from elevators in Chicago served by the Belt Railroads.

A. This is rather a complex move in this congested Chicago Switching District, but I will attempt to explain it to the best of my ability.

Cars for placement are handled as follows:

(1) Cars going to elevators on the Indiana Harbor Belt Railroad are delivered in a road train from Elkhart or Kankakee to Gibson Yard.

These cars are necessarily mixed with other loads and empties. They are humped at Bigson for the designated areas.

The Indiana Harbor Belt Railroad have employed [fol. 179] pullers to the various yards where the empty grain cars are delivered. These cars are then placed at the elevators for loading.

Cars originating at the Englewood wash track are handled by puller crew from Englewood to the Indiana Harbor Elevator Yard.

The grain cars are then taken from the Elevator Yard to the interchange yard with the Indiana Harbor Belt, which is called Michigan Avenue Yard. These cars are then handled by an Indiana Harbor Belt crew from Michigan Avenue Yard to Gibson Yard where they are humped into the designated group track for handling by their puller crews to the various yards serving the individual elevators. In each case it requires four different crews to handle the empty cars for placement.

(2) Cars for the Belt Railway Company of Chicago are handled in road trains from Elkhart to Englewood Yard. There they are switched out of that train and handled by a yard crew with other cars for the Belt Railway Company of Chicago to our interchange tracks with the Belt Railway Company at their so-called Jeffery Avenue Yard at South Chicago.

From there the Belt Railway Company must handle them to the elevator. How many times the Belt Railway Company has to handle or re-handle these cars, I do not know [fol. 180] as I am not fully acquainted with their operation.

In addition to these cars from Elkhart, there will be cars from the Englewood Yard cleaning track which will also be delivered to the Belt Railway Company along with cars from Elkhart.

Cars from Elkhart require three crews and those from the Englewood cleaning track two New York Central crews to handle to the Belt Railway Company for their further handling.

(3) Cars for the elevators on the Chicago River & Indiana Railroad Company from Elkhart are handled in road trains to Englewood. There they are switched out by a yard crew and delivered to the Chicago River & Indiana. The Chicago River & Indiana switch crews then must handle them to the elevators for placement and again I am not acquainted as to how many times their crews have to rehandle before placement at the elevators. Again, cars from the Englewood wash track will make a similar move. These cars require three New York Central crews handling same for delivery to the Chicago River & Indiana.

(4) Cars out of Elkhart for the Baltimore & Ohio Chicago Terminal Railroad are handled in road trains from Elkhart to Englewood. These cars are switched out and handled by the puller crews to Indiana Harbor Elevator [fol. 181] Yard. There the cars are taken to the Baltimore & Ohio Chicago Terminal railroad interchange tracks and delivered to them. They in turn handle the cars for placement at the elevators.

I am not acquainted with their operations after they are delivered to the interchange track. Here four New York Central crews are required to effect the interchange with the Baltimore & Ohio Chicago Terminal Railroad.

Q. Please describe the operation of supplying cars for New York Central movement from elevators in Chicago served by the Rock Island.

A. Cars from the Elkhart wash track are handled by a road train to Englewood where they are switched out by a yard crew and then a puller crew takes these cars, and cars from the Englewood wash track, to our interchange track with the Rock Island at their South Chicago Yard.

There the Rock Island handles these cars to the elevators, and I am not acquainted with their operation after we have delivered the cars to them.

Cars delivered for loading at the Calumet Port Authority area, which is switched by the Rock Island, are handled in road haul movement from Elkhart to Gibson yard where they are switched by an Indiana Harbor Belt crew into the Kensington Yard connection track.

[fol. 182] The Kensington Yard engine hauls these cars then from Gibson to Kensington. There they are switched out from other cars destined Kensington and delivered to the Rock Island at the interchange track at 115th Street.

These are mixed with other cars for the Rock Island. The empty grain cars are switched out by the Rock Island and taken to the Port Authority Yard and then subsequently placed at the elevators at the Port Authority.

To effect this placement, it takes respectively three crews in the first case and four in case of the Port Authority.

Q. Please describe how loaded cars of grain are handled from elevators served by the New York Central at Chicago to elevators at Kankakee, Illinois.

A. Cars loaded at Indiana Harbor Elevator Yard are switched for road haul movement at the elevator yard. These cars are picked up by a road crew operating on the Danville subdivision.

This road crew sets these cars out at Schneider, Indiana. These cars are mixed with other Kankakee Subdivision cars. At Schneider, Kankakee Subdivision road crews traveling west to Kankakee will switch out cars destined Kankakee and take them in their road train to the west yard at Kankakee.

Since these cars are mixed with other Kankakee cars, [fol. 183] they are switched from the road train to the grain inspection track. Once they have been inspected, they are then handled to the elevator at Kankakee.

Cars originating at the Kensington elevator and the Calumet Port Authority elevators are handled by the Kensington Yard engine from Kensington to Gibson. There they are switched into the designated track for movement from Gibson by a Danville Subdivision crew to be set out at Schneider.

From Schneider the handling is the same as previously described. This requires four different crews handling the same car.

Q. Please describe how carloads of grain from elevators located on the Rock Island are handled by the New York Central to Kankakee.

A. Previously we described how the cars are handled from the Kensington area, which included the Rock Island delivery of cars from the Port Authority. However, there are other elevators located on the Rock Island. These loaded cars are delivered by the Rock Island to our Englewood Yard.

There they are switched for movement by a Danville Subdivision road crew from Englewood to Schneider, where they are set out and the handling by a Kankakee Subdivision crew is the same as previously stated.

[fol. 184] Again four crews handled the car or cars.

Q. How do you handle loaded cars of grain received from Belt Railroads at Chicago for delivery at Kankakee?

A. The Indiana Harbor Belt Railroad switches cars for Kankakee delivery into their designated tracks at Gibson

Yard where the cars are picked up by a Danville Subdivision road crew and again are set out at Schneider mixed with other cars for Kankakee, and the handling at Schneider is as previously described.

Cars for—cars from the Baltimore & Ohio Chicago Terminal Railroad are delivered by that railroad to the New York Central on the designated interchange track at Whiting. There they are picked up by the Indiana Harbor Elevator Yard crew and taken to the Elevator Yard where they are switched out for movement by a Danville Subdivision crew to Schneider and on to Kankakee as previously described.

A minimum of four crews handled these cars.

Q. How do you handle carloads of corn originated at elevators in Chicago for movement to Danville, Illinois, Mr. Reynolds?

A. Once these cars for Danville are received at either Englewood Yard, Indiana Harbor Elevator Yard or Gibson Yard, they are switched for movement and picked up by a road crew operating on the Danville subdivision and are [fol. 185] handled directly by this road crew from one or more of these yards to the New York Central Lyons Yard at Danville, Illinois.

There the cars are switched for placement by a yard crew at Lyons Yard. This may necessitate a re-handling move before the cars arrive at the elevator depending upon the location of this elevator in Danville.

Q. How do you handle carloads of corn originated at elevators in Chicago for movement to Indianapolis, Indiana?

A. The cars for Indianapolis are handled by a Danville Subdivision crew to the interchange tracks at Scheff, Indiana.

This is an interchange with the New York Central's Southern District territory which includes Indianapolis. These cars are picked up by a Southern District road crew and handled to Indianapolis where they are switched by a yard crew for rehandling to the designated elevator at Indianapolis.

The number of moves at Indianapolis are not known by me.

Q. Describe the movement of corn originated in Chicago for movement to Paris, Illinois.

A. Once again these cars are handled from Chicago to Lyons Yard by a Danville Subdivision crew. They are then [fol. 186] reswitched into the designated tracks for movement from Lyons Yard to Paris, Illinois. There they are reswitched and handled by yard crew at Paris for placement at the elevator or interchanged to the railroads serving that elevator.

Q. What is the source of empty cars for loading of grain at stations west of Kankakee on what has been described as the Kankakee Belt?

A. Cars are accumulated at Kankakee from the connecting railroads all along the Kankakee Belt in that we have local service daily between Kankakee and South Bend, which is commonly called the east end, and local service on the west end.

The major points of receiving cars are Zearing, Illinois from the Chicago, Burlington & Quincy, and Chicago & Northwestern; Depue with the Rock Island; Streator with the Santa Fe; the Chicago Burlington & Quincy, and the Gulf, Mobile & Ohio.

I mention particularly Zearing and Streator in that cars arriving at these locations are commodity inspected at that time and any OK grain cars in the delivery can then be placed by the crews picking them up on the west and on their eastbound movement spotting them at the elevator enroute.

This eliminates switching operation in Kankakee Yard. [fol. 187] The cars required to be cleaned are handled to Kankakee, placed on the cleaning track, and then returned to the elevators on the west end by one of the two trains operating daily out of Kankakee.

If this supply does not meet the demand, we have direct train service from Elkhart Yard to Kankakee where these cars can then be switched at Kankakee for movement west to be placed at the elevators.

This is a faster and more economical arrangement than having to pick up the cars at Schneider as was previously described.

Q. Describe the operation of supplying cars for loading of corn at elevators west of Kankakee.

A. The local agent handling the elevator places orders for cars with the car distributor at Kankakee.

The car distributor then gives the order to the conductor on the road train serving that area. Cars which are commodity inspected at Zearing and/or Streator and found to be OK for grain are available for placement that day.

In addition, the local agents at stations on the west end of the Kankakee Belt inspect the cars made empty at their station and orders OK grain cars placed at the elevator for loading or reports same to the car distributor for his handling with the conductor.

[fol. 188] Another method of obtaining grain cars is that the conductor and crews on the west end, due to their experience with grain loading, can ascertain whether a car they pick up at a non-agency station is OK for grain, and, if so, they will spot that car at one of the elevators and report same to the car distributors.

If this supply is not sufficient, it is supplemented with cars from the Kankakee wash track.

Q. Do you use system cars or foreign cars for the corn movement on the Kankakee Belt?

A. Primarily it is system equipment. There is a great deal of our equipment that is just in shuttle service between the elevators on the west end and Kankakee and returning in a matter of days back for another load.

Also the equipment that we receive on the west end from the other railroads is New York Central equipment being returned home, and that again is spotted.

So it is system equipment primarily.

Q. Describe the operation of supplying cars for loading of corn at elevators west of Kankakee.

A. The local agent handling the elevator places orders for cars with the car distributor at Kankakee. The car distributor then gives the order to the conductor on the road train serving that area.

Cars which are commodity inspected at Zearing and/or [fol. 189] Streator and found to be OK for grain are available for placement that day.

In addition, the local agents at stations on the west end of the Kankakee Belt inspect the cars made empty at their station and orders OK grain cars—

Q. Describe the train service on the Kankakee Belt between Zearing and Kankakee?

A. There are two local trains serving this area. One is known as the Streator Turn. This train is out of Kankakee and does local work between Kankakee and Streator in each direction of its run.

The other local train is called Train 91-92. This train operates out of Kankakee daily and does work between Streator and Zearing, Illinois, in each direction.

These trains place empties on their westbound movement and pick up loads on their eastbound movement.

Q. Do the Streator and Zearing Turns spot empties in the morning and pick up loads on the same cars on the return trip in the evening?

A. Quite often, yes.

Q. How do you handle carloads of corn originated at elevators west of Kankakee to elevators at Kankakee?

A. The cars are picked up by one of the two local crews previously described and taken to the west yard at Kankakee where they are switched from their train directly [fol. 190] into the grain inspection track. This is a separate track in Kankakee Yard.

After inspection, the cars are handled by a yard crew to the processing point.

Q. Is that grain inspection track that you refer to the same track that the cars are placed on in the movement from Schneider to Kankakee if they are coming from Chicago?

A. Yes.

Q. How do you handle carloads of corn originated west of Kankakee to Indianapolis, Indiana?

A. The local crew bring these cars into Kankakee where they are switched to their designated tracks for road haul movement by an eastbound crew working east of Kankakee.

This is normally Train No. 94, which train sets the cars out at Schneider, Indiana. There they are picked up by a Danville Subdivision crew and placed with other cars to be set out at Sheff.

There they are picked up by a Southern District crew and handled by it from Sheff to Indianapolis.

Q. Do you handle carloads of corn originated west of Kankakee to Danville, Illinois?

A. Yes. These cars are brought into Kankakee and switched for movement by a Kankakee eastbound train to [fol. 191] be set out at Schneider, Indiana, where they are then picked up by a Danville Subdivision crew and handled directly to Lyons Yard at Danville, Illinois.

Q. How do you handle carloads of corn originated west of Kankakee to Paris, Illinois?

A. These cars are handled from the west end to Kankakee West Yard where they are switched for movement by a road crew and are set out with other cars for Danville at Schneider, Indiana.

They are picked up there by a Danville Subdivision crew and handled to Lyons Yard. There they are re-switched to the designated tracks for movement from Lyons Yard to Paris by another road crew.

Q. Mr. Reynolds, with your knowledge of the New York Central operations in Chicago, and on the Kankakee Belt, can you state whether the operation of originating corn at stations west of Kankakee for movement to Kankakee would be more or less expensive than the operation of originating corn at Chicago for movement to Kankakee?

A. The empties required for loading of corn originating on the Kankakee Belt are handled in road haul service and switch service at the local elevators by the train crews now performing the service along our line between Kankakee and Zearing, which train service we would maintain even if we were not handling corn from the local.

[fol. 192] However, on corn originated at Chicago, there are numerous inter-train, intra-train and interchange switches involved, all of which make that a more difficult and costly operation than the Kankakee Belt movement.

Therefore, the Kankakee Belt movement is less expensive.

Q. What is the relative situation on movements from Chicago or Kankakee Belt elevators to Danville?

A. The operation from Chicago to Danville is a more difficult and costly operation than the movement from Kankakee

Belt stations to Danville.

Q. Is the same situation true on shipments to Indianapolis, Indiana and Paris, Illinois?

A. Yes.

Q. Do you have any records showing the supply of grain cars available at Kankakee?

A. Yes.

Mr. Murphy: Your Honor, may we have this marked for identification?

Exam. Dahan: Yes. This will be marked as Exhibit No. 24.

(Applicant's Exhibit 24, Wit. Reynolds, marked for identification.)

By Mr. Murphy:

Q. Do you have any records showing the supply of grain cars available at Kankakee?

[fol. 193] A. Yes, I have a summary for the period August 30, 1957 through December 31, 1957 with a recapitulation which is my Exhibit 24. The fact is, we had so many box cars at Kankakee during that period that we were required to move them to other points on our line for storage.

Q. Mr. Reynolds, has any consideration been given to abandoning a portion of the Kankakee Belt Line?

A. Yes, there was, about three years ago. There was a serious study made as to the abandonment of the portions west of Streator due to very light business.

Mr. Murphy: Thank you, Mr. Reynolds.

The witness is available for cross examination.

Exam. Dahan: Do you have any questions, Mr. Bradford?

Mr. Bradford: No questions.

Mr. Legg: I have some.

Cross examination.

By Mr. Legg:

Q. Mr. Reynolds, do the trains from Kankakee west to Streator or to Zearing keep regular schedules?

A. Yes.

Q. Could you give the times of those schedules then?

A. The Streator turn is called at Kankakee for 11:00 a.m., that is an assigned crew, and due to labor agreements, we are required to have a designated time.

Train 92, I am afraid I can't give you that schedule, it is not an assigned crew, and it is called when the train is [fol. 194] ready, but it is normally in the evening sometime.

Q. Does the train to Zearing make switches or pick-ups at stations west between Kankakee and Streator?

A. At times, yes, sir.

Q. At times, and the Streator Turn train also makes switches and pick-ups at stations between Streator and Kankakee?

A. Oh, definitely, yes.

Q. Is the Streator Turn train a train used also for transportation of interchange traffic between other railroads?

A. Both trains are, yes.

Q. Both trains are?

A. Yes.

Q. You say the yard crew is on call at 11:00 o'clock for the Streator train, is that it?

A. Yes.

Q. How nearly will the train leave after 11:00 o'clock ordinarily? How regular is that?

A. We attempt to maintain that schedule. We have a connection coming from Elkhart which at times might hold it up.

Q. Do you have any idea how regularly departure has been in fact?

A. I would say that it is better than 50 per cent.

Q. Does the train sometimes leave as late as three o'clock from Kankakee?

[fol. 195] A. Yes.

Q. About what time would it get into Streator, then? That was 3:00 p.m. you said?

A. Yes.

Q. Strike my last question.

Does it leave sometimes later than 3:00 o'clock from Kankakee?

A. Due to some disruptions of service, it might, yes; I wouldn't say that after 3:00 o'clock it was a usual condition that would cause it.

Q. Up to 3:00 o'clock it might happen more or less frequently, though, that the train would leave—

A. I would rather go back to my original statement that it is, for on time departure from Kankakee, better than 50 per cent. I don't recall specific cases.

Q. You do not have any set time for the train to Zearing to leave Kankakee?

A. We are attempting to make our interchange with other railroads prior to midnight; therefore, that is a requirement that necessitates its leaving in the evening, and we like to have those cars on to the other roads before midnight, and that is the only requirement that we have on it.

Q. Do the Streator turn trains carry cars destined to Zearing and leave them on the tracks at Zearing or at [fol. 196] Streator pick-up by a later train?

A. I couldn't say.

Q. Does it ever happen that any of the trains skip a day, they just don't run a day?

A. Disruption of service happens; it could happen.

Q. Are these trains scheduled to run Saturdays and Sundays?

A. One of them is, yes.

Q. Which one?

A. The Zearing Turn. The Streator Turn I am not sure of, to tell you the truth.

Q. Would the Streator train run five days a week, then?

A. I am positive that it is running at least six. I am not sure about the 7th.

Q. How frequently did these trains run before the Kankakee Belt's five cent rate was put in effect?

A. The same. That is the great advantage to it is that we had to maintain the service out there if we are going to have any type of service, and they—this helped the trains a great deal at no extra cost.

Q. About how long is the run from Kankakee to Streator and how long is the run from Kankakee to Zearing?

A. The crew going to Streator will make a round trip and do their work in 8 to 10 hours. The train going to Zearing will take, due to the long mileage that it has to run, 12 [fol. 197] to 16 hours.

Q. Does the same crew make the round trip for each train?

A. Yes.

Q. Do you know about how long your running time was before the 5 cent rate went into effect?

A. I would say there isn't too much difference. Naturally there is going to be some because of the work en route.

Q. What is the base number of hours that your crews are supposed to work during the day?

A. A crew who has been on duty 16 hours is required by law to tie up at the point where they have been on duty 16 hours.

Q. What is the basis for that? What is the basis for their pay?

A. It is 8 hours or a hundred miles is a day's pay, and that is actual mileage run.

Q. How often do you get OK inspected cars at Streator? What percentage of your total cars used on the Kankakee Belt are derived from that source?

A. I don't have any figures available.

Q. Would you have any idea of whether it was a large percentage or a small percentage?

A. I am afraid I wouldn't even want to guess on that one; I am sorry.

[fol. 198] Q. How often are cars made empty at Kankakee Belt stations which are OK inspected?

A. On the west end it is very light because there is no appreciable amount of loaded movement out there.

The east end—

Q. Excuse me. Is the west end all that portion west of Kankakee?

A. Yes. I am sorry.

Q. That is all we are concerned about.

A. We do derive cars from the east end.

Q. Do you get OK inspected cars from Zearing, too, at times?

A. Yes.

Q. About what percentage of your cars are derived from that source?

A. Of the total cars?

Q. Yes.

A. It would be very light.

Q. Are there any other interchange points on the Kankakee Belt west end from which you might derive OK inspected cars?

A. Oh, yes.

Q. What are they?

A. OK inspected?

Q. Yes.

[fol. 199] A. I am sorry, no, just Streator and Zearing.

Q. Just Streator and Zearing?

A. By OK inspection, I am talking, or you are talking about a car inspector actually putting a tag on the car. At other interchanges the conductor will look over the cars and if he finds any good grain cars in them, why then he will place them, but that is not in the terminology of an operating man an OK grain, and as to those, they do occur frequently.

Q. Is there any risk of liability for loss or damage from the conductors making the placement without having an OK inspection?

A. I don't know; I couldn't say.

Q. About how frequently do you spot cars on the west end of the Kankakee Belt in the morning and pick them up in the evening with respect to corn at these elevators?

A. I wouldn't care to guess.

Q. Would it be a very small percentage of the total number of cars or a rather large one?

A. I couldn't say.

Q. You couldn't answer?

A. No.

Q. Turning to your Exhibit 24, are the captions "Empties off wash track, from General Foods and Borden's, from yard inspection and Off Rip Track" designed to indicate the [fol. 200] sources from which you derive cars?

A. Those are some of them, yes, sir. This report shows the cars available at Kankakee for placement at any location we do desire to distribute them.

Q. Is it possible that a car at General Foods on September 3rd would be listed as an empty off wash track on September 4th or in some such sequence as that?

A. Depending on the car, if it had to go to the wash track, yes.

Q. This is merely a listing of cars at these various points on the day specified?

A. Correct.

Q. And there may be movement from one of these points to one of the other points stated in the exhibit on successive dates?

A. One thing, once the car is a grain car, then it would not necessarily have to go on to the wash track because it is already OK for grain. It would be available that day for loading. It wouldn't show off of the wash track the next day because it didn't go on the wash track.

If it was a car that was not fit for grain at General Foods, it would not show under this General Foods column but then it might appear the next day off of the wash track.

I am afraid that I jumped my answer to your other ques-
[fol. 201] tion a little too soon. I am sorry if I misled you.

Do you see what I mean?

Q. I understand that.

Does an empty off the wash track have to go to yard inspection or does it come from yard inspection to the wash track?

A. The cars do not have to go back from the wash track into yard inspection, no; they are commodity inspected. A car that has not previously been commodity inspected anywhere will be commodity inspected on the wash track.

It is a little confusing in that the time element of inspecting cars out in the yard at Kankakee due to physical characteristics is such that empty cars are put over the wash first, and when they have not been commodity inspected previously.

I am afraid I have confused you on that one.

Q. Yes, you have.

A. A car that comes into Kankakee and has been commodity inspected goes directly into the designated track, whether it is to go out to the west end of the line or somewhere else for loading.

A car that comes into Kankakee that is not commodity inspected goes to the wash track.

Q. And would be inspected at the wash track?

A. Yes.

[fol. 202] Q. It would not then go on to the yard inspection track?

A. No. Well, it is on the track in the yard first and it is not inspected until it gets on the wash.

Q. Is the wash track the same as your yard inspection track?

A. No.

Q. Do you have yard inspections apart from inspections on the wash track?

A. Yes. You see, every train that goes out of the yard had an inspection. Every train that goes out of the yard has to be inspected for the safety appliances, proper piston travel, for the air brakes on the train, and in my terminology, that is an inspection on the inspection track in the yard. It is not necessarily just for commodity inspection.

This column which says "From yard inspection" is cars that are out in the body of the yard which is the switch yard and are OK'd for grain right out there rather than going in on to the wash.

Q. What is the rip track?

A. That is repair; that is a slang expression for repair, so it shouldn't have been used.

That is another track away from the wash where cars are repaired, and at that time they are also commodity inspected, upgraded, OK'd for certain commodities.

[fol. 203] Q. You do not move them off the rip track, then, to yard inspection or off the rip track to the west track?

A. Not the cars that are shown on this report.

Q. Not the cars on this report?

A. No.

Q. Mr. Reynolds, so that I can have this clarified, would you explain how cars are handled when they come into the yard as to who makes the decision as to whether they need to go to the repair track or the yard inspection, the wash track, and how they finally get into a train that is made up for movement?

A. Prior to the train's arrival, if the train comes from Elkhart or if they are cars from Englewood that are set

out at Schneider, there is a teletype consist sent on that whole train.

If the cars have been OK'd for grain at one of those yards, then opposite the car number it says "Ok for Grain."

So they know they have these OK cars coming in.

Once the train arrives, why the engine is detached, the caboose is detached, the switch list is prepared on that train, cars are taken from both ends on to the switching leads and switched according to their designation.

A car or any cars that are carded "OK for Grain" or they knew were OK for grain from the teletype are switched into the designated tracks.

[fol. 204] Cars that come in with no commodity inspection on them are switched to another designated track. Those cars there are then taken to the wash track where they are washed and commodity inspected.

Once the cars that did not have to go to the wash track are assembled with cars that have come off of the wash track, say, the previous eight hours, they are assembled in the train in whichever direction it is to go.

Once the train is completed, it is grouped, it is what we call turned over to the car inspectors. At that time the car inspectors at each end of the track blue flag the track, that is, no engine can go in and couple those cars while the car inspectors are doing their work.

They go through and couple the air, and at times, depending on the train or where it is to go, they will oil cars, they make their physical inspection of the cars.

The train is put to air and the air test is made.

The train of course in the meantime has been ordered, the road crew reports, the engine is put on the head end of the train, the caboose on the rear. The terminal air tests are made and the train departs with their cars properly grouped for setting out at the stations en route.

If a car in the meantime in that train is found where the piston valve is not—where the piston travel is not [fol. 205] correct and cannot be corrected there in the yard, or they may find that a grab iron is bent or some other defect on the car, it will then be bad ordered and taken by the blue flag.

The blue flag is lifted from both ends, a yard crew goes in and puts or pulls that car out, sets it out on another track, goes back and recouples the train so it can move, and at a later time that car is taken to what we called here the rip track and it is repaired.

Now also there would be empty cars that arrive that will be found in the switching to be bad ordered, or in switching someone will observe something on the car, and they will call to the car inspector and he will tag that car bad order, and then it will go to the rip track, and at that time, while it is being repaired, the car is also worked on for upgrading if it needs a couple of boards, something similar to that, to make it an OK car.

That is the way it is handled and that is the way we get these off the rip track OK.

Q. Mr. Reynolds, which interchanges are served by each of these two trains that you discussed this morning?

A. The Streator Turn leaving Kankakee will set cars out on to the Wabash, the G.M. & O., the C.B. & Q., and the Santa Fe.

[fol. 206] Q. And at Streator?

A. At Streator, and the Wabash, of course, which is at Reddick.

On occasion there are cars routed Dwight for the G.M. & O. and they would be set out there.

The Zearing Train, the Zearing Turn or Train 9-92 will take cars normally beyond Streator if there is a rush car or a car that is missed in the connections at Reddick or Dwight, he would take those also.

After he goes by Streator, he will work at Lostant with the I.C., go on to Depue with the Rock Island, set out cars at Howe for the railroad that serves the zinc works.

He will take cars to Zearing for the C.B. & Q., and if there are any cars for the North Western, he takes those also, and the Milwaukee. The latter two are at Ladd.

Q. Do you have the same interchange of traffic on the trains coming east that you have on the cars going west?

A. Now, they are normally set out to the railroads going west and picked up on their return.

Mr. Legg: I have no further questions. Thank you.

Cross examination.

By Mr. Freeman:

Q. Did you say, sir, would your Streator Turn stop at Dwight, for example?

[fol. 207] A. Yes.

Q. Would you describe the interchange operation and the switch operation to the elevator at Dwight?

A. The interchange at Dwight is in the northwest quadrant. A train pulls across the G.M.&O. and shoves the cars in on the interchange track.

Q. Just a minute. The train does what?

A. Pulls across the G.M. & O. tracks and then shoves the train in on the interchange track.

Q. You have an interchange track with the G.M. & O. Which crosses at Dwight?

A. Yes.

Q. Let's assume that you have a car that is to be interchanged with the G.M. & O., and you have a car to be set out, either an empty to be set out at the Dwight elevator or a load to be picked up, will you describe that operation at the Dwight elevator?

A. The Dwight elevator, and I am sure that I have the right one, sits on the—is in the southwest quadrant.

The switch leading to that is at the east end of the elevator. Therefore, the car has to be what we call dropped into the track, the edge is on the—the engine is on the run, and the car is cut off, the engine goes by the switch, and the car is put in there, and then he goes back and places it.

[fol. 208] Q. This is a separate and distinct operation from your interchange operation with the G.M. & O.?

A. Yes.

Q. Now is that a typical situation of your interchanges and your set-outs and pickups up and down the Kankakee Belt?

A. Yes.

Q. Am I to understand from your testimony that there are only two trains a day of any kind that run over the Kankakee Belt?

A. Yes.

Mr. Murphy: You are referring to the west end, are you?

Mr. Freeman: I am referring to from Kankakee to Zearing.

The Witness: Yes. There is one other train that runs very occasionally that I am not permitted to discuss here that does no other work on the line but is special duty. It is a special train.

Q. What do you mean, a "special train"?

A. I am sorry, I can't go any further. I do not wish to perjure myself to say that is the only—

Mr. Murphy: Off the record.

(Discussion off the record.)

Exam. Dahan: On the record.

The Witness: I didn't care to perjure myself, as I say, [fol. 209] that that is the only two trains.

By Mr. Freeman:

Q. How long have you had merely the two trains on the Kankakee Belt west?

A. I have been out here three years and that is all to my knowledge.

Q. For three years?

A. Yes.

Q. Have you recently done considerable work on the right of way on the Kankakee Belt west?

A. Not half enough.

Q. Before— But have you done considerable work? Have you reballasted, for example?

A. Nornal maintenance, yes.

Q. Have you reballasted the Kankakee Belt west?

A. Not entirely.

Q. From where to where have you reballasted?

A. I think we are up as far as Dwight. I am not sure of that now.

Q. From Kankakee?

A. Yes. I am not sure that we are that far.

Q. I think you will find if you will check your railroad, sir, that you are.

A. If I had my track diagram with me, I could tell you right off.

Q. When is the last time that you looked over the Kan-
[fol. 210] kakee Belt west?

A. I was over that in—it has been this fall, I think it was, October, that I covered the entire west end. I have been to Kankakee some.

Q. You are not familiar with the fact you have rebal-lasted beyond Dwight?

A. I have so many miles of track that keeping each one individually in mind, I can't, and I certainly wouldn't want to tell you an untruth.

Q. Mr. Reynolds, have you ever participated in a switching cost study of grain in the Chicago terminal?

A. No, I haven't.

Q. At Kankakee?

A. No, I haven't.

Q. Have you ever made a switching cost study or participated in the making of a switching cost study?

A. No, I haven't.

Mr. Murphy: I object to going out to other territories. He says he hasn't participated in any.

By Mr. Freeman:

Q. I am just trying to test the man's background with some of the statements he had made here with respect to the comparative costs, Chicago and Kankakee, and I would like to know if the man knows the elements that go into making a switching cost study to determine whether or not he can make the kind of statements which support the kind
[fol. 211] of statements he has made on this record.

Mr. Murphy: Ask him the basis for his statements.

Mr. Hayes: I think the witness answered the question that he never had participated in a cost study.

Mr. Freeman: That was my understanding.

The Witness: That is right.

By Mr. Freeman:

Q. Do you have a switch engine assigned at Streator?

A. No, we do not.

Q. Do you have a yard at Streator?
A. Yes.
Q. How many tracks?
A. Five.
Q. Do you call that a classification yard?
A. Yes, that is our yard.
Q. Now which one of these trains switches that yard?
A. The Streator Turn.
Q. The Streator Turn?
A. Yes, by special agreement.
Q. By special agreement with whom?
A. With the organizations that we do not have a switch engine on duty there and this man does the switching.
Q. Your employees, when you refer to an agreement?
A. Yes.
[fol. 212] Q. How long would a switch engine be engaged in a normal day of switching at Streator?
A. Handling all of the industries and the interchange, three to four hours.
Q. And this switching at Streator is on a five day or a seven day basis?
A. That is on, I believe 6 days.
Q. Six day basis?
A. I believe so.
Q. How many units, diesel units, does the Streator Turn train have?
A. Normally two. We do try to get three on there if the power is available.
Q. How many units does the Zearing Train have?
A. Two, and we try to get three or four depending on how the power is.
Q. Do you have two units on the Streator Turn because of the necessity for two units to switch at Streator?
A. No.
Q. Now going to your switching operation at Kankakee, how many yards do you have at Kankakee?
A. We have four yards.
Q. You have four yards?
A. Yes.
Q. Is one of them a classification yard?

[fol. 213] A. Two of them are classification yard. That is, under my supervision, I am speaking of.

Q. I fail to understand you. You mean there may be more yards in Kankakee which are not under your supervision?

A. Not of the New York Central.

Q. I am only referring to New York Central yards.

A. Yes.

Q. You have two classification yards?

A. Yes.

Q. Where are those classification yards?

A. The west yard which is off the Kankakee Belt west of Kankakee and the Court Street Yard which is the terminus of the southern district operation at Kankakee.

Q. What are your other two yards?

A. We have two industrial yards, one of which is called Fifth Avenue which is right at Fifth Avenue at Kankakee, which is east of the West Yard and west of the Illinois Central crossing, and East Yard, which is east of the Illinois Central crossing in that industrial area.

Q. Will you tell me about the handling that your train gets in Kankakee? Let's take the Streator Turn train first, it goes to the west classification yard?

A. The Streator Turn originates at the West Classification Yard.

[fol. 214] Q. I am coming in, if you will, and we are going to break up the train, we are coming back, we are coming east into Kankakee, and I would like for you, if you will, to tell me the steps in the first classification yard.

A. The cars arriving at West Yard are switched by one of the two yard engines which are on duty into the designated tracks for the classification of the cars in that train. Local industrial cars are put in on their designated tracks.

The cars that are moved east directly from Kankakee are put in on their designated tracks.

Q. Now we have the train broken up?

A. Yes, sir.

Q. Do you have a hump there or is that flat switching?

A. That is flat.

Q. Flat switching?

A. That is right.

Q. Let's suppose that we have a car in that train to go to General Foods. Will you tell me how that car is handled?

A. If it is a car of grain it has to go—

Q. A car of grain, let's say, for General Foods.

A. It has to go to the inspection track.

Q. Where is the inspection track? Is that in your west end classification yard?

[fol. 215] A. West yard, yes.

Once the grain has been inspected, it is put in the track for General Foods industrial cars, and it can either be handled from west yard directly to General Foods or they can go from west yard to Fifth Avenue Yard and then to General Foods.

Q. You have a transfer run, a regular transfer run from west yard to Fifth Avenue, for example?

A. Well, that is—all crews go on duty at Fifth Avenue and then they go out to west yard, and do their switching, and then come back to Fifth Avenue to go off duty. Therefore, the cars—it is not a regular transfer; it is the crews going on duty take cars out to west yard and going off duty take cars back to Fifth Avenue.

Q. And at Fifth Avenue what happens, is it put on a track?

A. On a track.

Q. Is this a car destined to General Foods?

A. Yes.

Q. It is put on a track with other cars which are destined to General Foods?

A. If we have cars at Fifth Avenue, yes.

Q. Then you will have an industrial switch from Fifth Avenue to General Foods?

A. Yes.

[fol. 216] Q. Now is that an explanation of the complete handling, everything that would happen to that car from the time it arrives at Kankakee until the time it goes to General Foods?

A. It arrives, of course, at east yard, the industrial yard, which we spoke of, and then is placed at General Foods. The same crew that takes it out there places it, however.

Q. Excuse me. It does not go to Fifth Avenue Yard; it goes to east yard from the classification track?

A. No, it goes from west yard to Fifth Avenue, and the crew going on duty that works General Foods, just rather than send him clear from Fifth Avenue out to West Yard

and then bring him back from there through Fifth Avenue Yard to go to east yard, since the crew is on duty at Fifth Avenue, he makes the pick-up, he picks his cars up there and goes on out to east yard and then spots the cars in General Foods which is right there at east yard.

Q. So that the car would go through three yards?

A. Because we desire it to. It is a more economical way to handle it.

Q. Yes, for whatever reason, it goes through three yards. I am just trying to find out how this car is handled.

A. It is the economy that dictates it. It is more economical that way.

[fol. 217] Q. Now can you tell us about a car which is going not to General Foods, a car of grain, but is going east out of Kankakee?

A. How far east?

Q. The car runs—well, let's say it is going to Indianapolis. I merely want to know about your yard handling, that is what I am addressing myself to, Mr. Reynolds, so that we understand each other.

Confining the questions to that particular service at this point, will you describe the handling that the car gets which is destined to Indianapolis—the car gets in the Kankakee yard?

A. It is switched to its designated track, depending on where it is to be set out.

Q. This first is in the west yard?

A. West yard, yes. The car is switched into its designated track at Kankakee, the train is grouped according to the set-offs that the car is to make or the train is to make, and once that train is grouped, it is coupled, the air is then turned on, it is turned over to the car inspectors for their work, the road crew is ordered, and the inspectors OK the train, do whatever work they have to do on it, and then the road engine and caboose are put on the train and the train departs.

Q. Does the car at west yard or at any other place in [fol. 218] Kankakee get a grain inspection?

Mr. Bradford: You mean a car of grain going to Indianapolis?

The Witness: I couldn't say.

By Mr. Freeman:

Q. The car comes into the Kankakee Classification Yard?

A. Yes.

Q. And the trains east are made up at the west end classification yard?

A. Yes, sir.

Q. And leave from the west end classification yard?

A. Yes, sir.

Q. Did you actually tell us how many trains you had out of Kankakee east?

A. No, I didn't.

Q. Kankakee to Schneider, for example, is your point at which you have converging lines.

A. We have under normal operations a local operating between Kankakee and South Bend on alternate days, and then we have two trains that work from Kankakee to Elkhart, Indiana, and there may be more in that service depending on the volume of business.

Q. Am I to understand that the cars shown on Exhibit 24 are all cars which are OK cars?

A. Yes.

[fol. 219] Q. Are these all New York Central cars?

A. I could not guarantee that. I think I had better qualify it and say there are some foreign in there.

Certainly since the past three months, with business being down the way it is, I could guarantee that before, but I couldn't say for sure.

Q. Is this a period, because of business conditions being such as they were,—is this a period of car surplus?

A. Yes.

Q. Would you have expected this condition in the fall of 1956?

A. Well—

Q. At Kankakee?

Take a comparable period, 8-30-56 to 12-31-56, would you have had this kind of a surplus of grain cars at Kankakee?

A. I couldn't say. I am trying to recall that fall and that particular area.

Q. Instead of trying to pin-point this, let me make it broader, '55 or '54, in the history of the past three or four

years, would you expect this kind of a condition to prevail in the fall of the year?

A. I couldn't say. I don't recall the conditions down there.

Q. Is the New York Central an unusual railroad in that [fol. 220] it has a surplus of Class A box cars at harvest time?

A. I don't know.

Q. You do have a surplus of cars normally at harvest time on the New York Central?

A. No; no.

Q. So that you would not call this an unusual—I mean, you would not call this a usual condition?

A. We are talking about a specific area.

Q. We are talking about Kankakee.

A. And I can't recall it specifically.

Q. You show during that period 3608 cars and a need for only 258 cars. I call that a surplus.

A. Yes.

Q. You had no demands for these Class A box cars at other points on your system, so I assume you would call that a surplus, of course, would you not?

A. Yes.

Q. I am asking you if that is a usual condition on the New York Central?

A. On the New York Central, no.

Q. In the heart of the grain season?

A. No.

Q. That is all I was asking you.

A. I am sorry.

Q. Do you store box cars in bad order at Streator?

[fol. 221] A. Bad order? Not to my knowledge. Do you have a period you were thinking of? Maybe that would help me.

Q. Yes. I am asking you if that is a usual condition on the New—strike that.

Would you be surprised if on January 13th, which is the date that has been given me, there were 80 or 90 box cars on a track outside Streator?

A. No, they are there.

Q. Are those Class A box cars in good condition?

A. They are not class A. They are cars in storage.

Q. They are cars in storage?

A. That is right.

Q. Not Class A box cars?

A. Not to my knowledge, no.

Q. Would you be surprised to know that there were another 60 or 70 cars at Lehigh?

A. No. I have nine miles of empty equipment in storage on my division today.

Q. Were those Class A box cars in good condition?

A. At Lehigh?

Q. Yes.

A. I don't know.

Mr. Murphy: I am going to object to this. The exhibit shows grain cars, and now they are cross examining about other types of equipment, and I think we are getting far afield.

[fol. 222] I object to the question.

Mr. Freeman: We are talking about box cars and his box car situation, and I am going to ask him one more question.

Mr. Murphy: The exhibit shows grain cars.

Exam. Dahan: Let's see what the question is. You may ask him.

By Mr. Freeman:

Q. One more question along that line.

Do you use this as an area in which you store cars?

A. No, sir; ordinarily, no.

Q. Just in this particular time period we are talking about, you are storing the cars?

A. I have them tucked in every corner on my division that I can find.

Mr. Freeman: I wonder if I might have five minutes to talk with my colleague before I go into another subject?

Exam. Dahan: We will go right along with Mr. Chartrand.

Cross examination

By Mr. Chartrand:

Q. Mr. Reynolds, you gave quite a complete showing here with regard to the handling of empty cars furnished elevators in Chicago for loading.

To what extent do these elevators reload equipment they made empty?

A. I would say they would.

Q. To what extent?

[fol. 223] A. I would have no idea entirely.

Q. So we don't have any idea to what extent the handling that you show here has any application to what actually happened?

A. I am only superintendent for the New York Central in Chicago. What goes on on the other railroads I have no idea.

Q. On your railroad.

A. On my railroad they reload a hundred per cent.

Q. They reload empty cars?

They reload cars made empty one hundred per cent?

A. Unless there is penalty defects or the car is a bad one.

Q. Would that result in an appreciable amount or number of cars?

A. Yes.

Q. Then would you hazard a guess as to what extent the New York Central furnishes elevators on your railroad empty equipment from the hold tracks from this Englewood yard to some of the others?

A. I know at times the demand is beyond the capacity, which is 40 cars a day, and the demand is beyond that, sir.

Q. What is the overall, the average picture, though?

A. Well—

[fol. 224] Q. Not the extreme.

A. I would say—

Q. Could it be a relatively small per cent of the loadings?

A. I would not say, offhand.

Q. Do you have any idea, 50 per cent?

A. I would say 50 per cent of our cars are going for grain loading when the grain is loading, just speaking of that period.

Q. We are talking about 12 months out of the year.

A. To my limited knowledge, grain isn't loaded 12 months out of the year. It may be now in certain areas, but I still think 50 per cent of our Englewood wash goes for grain. Yes, sir, I will stand by that.

Q. Englewood wash?

A. Englewood Wash Track.

Q. What do you mean by that?

A. We take the cars in on the track, they are dry cleaned, then wet washed, they are upgraded and boards are put in in places where there are leaks.

Q. Do all of your cars after they are made empty by industries in Chicago end up on that wash track?

A. No, sir.

Q. So we got a small per cent of cars that ever hit the wash track?

A. Our capacity is 40 a day and we are washing 40 a day.

[fol. 225] Q. 40 a day?

A. Yes.

Q. For the amount of business you handle in Chicago, would that be a relatively small wash track?

A. No.

Q. You indicated in part of your testimony insofar as part of the terminal handling is concerned that there were several, more than one move made because it was more economical an operation. Is that true also at Chicago?

A. No.

Q. None of the multiple handlings at Chicago is done for an economical purpose by the New York Central?

A. I can't think of one. Operating requirements—if you would care to give me a specific case, maybe I might be missing something.

Q. I understood you to say in response to Mr. Freeman's question—

A. At Kankakee, yes.

Q. At Kankakee?

A. That is right.

Q. What is so different than handling cars in the terminal at Kankakee for the account of the railroad then as an economical handling?

A. The crews, by agreement, go on duty at Fifth Avenue, and Fifth Avenue is in the center between the west yard [fol. 226] and the east yard, and so, rather than have this crew going on duty at the center and go back to west yard and get cars and then go right by Fifth Avenue again to east yard, we have the cars brought from west yard to Fifth Avenue, and the crew going on duty there takes them from Fifth Avenue to east yard.

It is just to save the double back run.

Q. You don't have any handling at Chicago?

A. That is comparable?

Q. Yes.

A. Well, if you can give me a specific case, I perhaps could tell you.

Q. Let me put it this way: Your wash track is in one location.

A. Yes.

Q. Let's say your inspection track is another location.

A. Now by inspection—

Q. Inspection of cars for safety appliances and so forth, or inspection of cars for cleanliness, they are at different locations?

A. Yes.

Q. Why don't you have them at the same location and inspect them and clean them right there?

A. We would have rubbish all over the yard.

Q. Well, it is an economical thing for you to clean them [fol. 227] in a separate place, isn't it?

A. It is an operating requirement.

Q. Operating requirement?

A. Yes.

Q. This handling that you described at Chicago on cars either being loaded or unloaded, that is not peculiar to the New York Central alone but the other railroads serving Chicago have similar problems?

A. I am not that well acquainted with their operations to judge.

Q. Well, you wouldn't say that it was peculiar to the New York Central alone then?

A. Truthfully I just don't know their operations. The reason I am saying that is I can think of some things they

can do that I can't that would make it much better for them.

Q. Then at a time in the past where the revenue received for hauling a car from Streator via Chicago to New York or Streator to Kankakee to New York, you say you made a great—

Mr. Murphy: Now—

By Mr. Chartrand:

Q. You say you had much less expense in connection with the Kankakee car.

Mr. Murphy: I object to the question. The witness hasn't testified in any regard with regard to revenue.

[fol. 228] By Mr. Chartrand:

Q. You claim that the expense for handling through Kankakee is less than through Chicago?

A. I said it was less expensive.

Q. Or more costly through Chicago than Kankakee, I believe that was the way you stated it?

A. I believe it was less expensive.

Q. Well, I refer particularly to the statement made at page 10 where you talk about—well, the question is: "With your knowledge of the New York Central operations at Chicago and on the Kankakee Belt, can you state whether the operation of originating corn at stations west of Kankakee for movement to Kankakee would be more or less expensive than the operation of originating corn at Chicago for movement to Kankakee?" And I believe you said that it was more expensive.

A. Where?

Q. "More costly operation."

Mr. Murphy: He said: "Therefore, the Kankakee Belt movement is less expensive."

By Mr. Chartrand:

Q. How much less expensive?

A. I have no way of knowing the exact figure or a figure. It is my knowledge as an operating man with the require-

ments of these interchange moves that leads me to that [fol. 229] conclusion.

Q. Well, you took a number of things into consideration in coming to the conclusion that it was less expensive?

A. Right.

Q. But you don't know how much less expensive?

A. No.

Q. You do not?

A. No.

Mr. Chartrand: Mr. Examiner, I would move that that portion of page 10 wherein he says that it is less expensive, but has no idea what it is, be stricken from the record.

Mr. Murphy: Your Honor, he has not placed a precise figure in the record.

Exam. Dahan: I will overrule the motion, so you don't have to make any speech.

By Mr. Chartrand:

Q. On outbound shipments from Chicago elevators, the handling that you have outlined here in your presentation, is that the same type of handling that would occur on ex-barge traffic?

Mr. Murphy: For clarification, do you mean ex-barge corn coming out of the Chicago elevator?

Mr. Chartrand: Yes.

The Witness: Yes.

By Mr. Chartrand:

Q. Does more than one crew participate in that turn-around from Kankakee to Streator, that 8 to 10 hour [fol. 230] time you referred to?

A. No, that is just one crew.

Q. You made reference to the handling both in and out of the Port of Chicago, Port Calumet, and the handling in connection with the Rock Island.

Has not the New York Central made application to the Commission to serve that Port direct?

A. Yes.

Q. Which would eliminate reference made herein insofar

as the handling at the Kensington Yard by the Rock Island Railroad?

A. Not at Kensington Yard.

Q. Well, did not the New York Central apply for direct entrance into the Port?

A. Yes.

Q. One more question, you refer on page 9 of your statement to shipments originating west of Kankakee going to Indianapolis?

A. Yes.

Q. And you indicate there that the cars are switched upon arrival at Kankakee to designated tracks. That is a classification of those west end cars?

A. Yes.

Q. They are classified and those for Schneider are set aside?

[fol. 231] A. Yes.

Q. After those cars arrive at Schneider, are they there classified?

A. Yes, on occasions. It would depend on the volume. There might be a Schneider car or a Sheff car that would remain there, and it might be mixed with other Schneider cars, yes. On other occasions they would have a solid group for Sheff.

Q. Well, of course we are not speaking of abnormal situations where you have got straight trainloads, but just the ordinary run of business would contemplate some ordinary classification at Schneider?

A. Right.

Q. Then I believe you did indicate that the cars are then picked up and they are placed with other cars to be set out at Sheff?

A. Yes.

Q. Are they there classified?

A. No; that is, all that goes to Sheff is cars for the east, cars east of Sheff on the southern district.

Q. East of Sheff?

A. Yes.

Q. You indicate they are then picked up by a southern district crew and there handled to Indianapolis?

A. Yes.

[fol. 232] Q. And upon arrival at Indianapolis they are classified?

A. Yes.

Q. And those that go to the inspection, grain inspection tracks, are set out and set on those tracks?

A. I am not acquainted with the Indianapolis operation, I am sorry, sir.

Q. You are not?

A. No.

Mr. Chartrand: That is all.

Mr. Freeman: I have just a couple more.

Exam. Dahan: All right. You may ask two questions.

Cross examination.

By Mr. Freeman:

Q. Mr. Reynolds, does the New York Central have the obligation for furnishing grain doors for the elevators along the Kankakee Belt?

A. Yes.

Q. How is that handled? How do you get the grain doors there?

A. We are presently using the paper doors. They are ordered by the agent and are delivered to the elevators. That is just a new operation. Prior to that we were using the wood doors.

Q. How recently was that change made?

A. It is the last couple months for the system, and I can't give you the exact date on the Kankakee Belt.

[fol. 233] Q. Who owns the grain doors that are piled up along these elevators on the New York Central?

A. The New York Central.

Q. Are you going to pick those up now that you have changed over?

A. No, they are to be used up until they are completed and then the paper will be used.

Q. But you have not yet shifted over?

A. The shift has been made, but all of the doors have not been used up yet.

Q. And you will bring those paper doors in a box car to an elevator and leave a supply there? Is that the way in which the paper doors are handled, or do you put a supply in each car?

A. I know we are not putting them in the car, but as to the actual physical distribution out there on the west end, I am not certain of it.

Q. How do you do it on the other parts of your system, then?

A. We are delivering them by truck. They are being ordered by the agents directly to be delivered to them.

Q. To the agent or to the elevator?

A. The agent is ordering them, and if there is an agency there, I believe they are being ordered directly to him.

Q. Does the agent give a supply of these doors for each car?

[fol. 234] A. Oh, no.

Q. One at a time or—

A. No, the supply is given to the elevator.

Q. Where will the elevators store the paper doors?

A. Well—

Q. Where will the loading points store the paper doors if there is no elevator there but you have a portable loading facility at that point?

A. If we have an agency there, it would be in the agency office. If we don't, I don't know, truthfully.

Q. You don't know how that matter will be handled when you have a portable loading facility along the road and there is no agency?

A. I don't, no.

Q. You have such situations along the Kankakee Belt, do you not?

A. Yes.

Q. Do you have anything to do with the leasing of land for the portable loading facilities?

A. I have to approve or disapprove of it, yes.

Q. Do you share responsibility to approve or disapprove?

A. With one of the people who does, yes.

Q. How many do you have now along the Belt?

A. I don't know.

[fol. 235] Q. You don't know how many you have approved?

A. No, sir.

Q. Do you have some pending applications?

A. Not that I can recall.

Q. This is a short term or a long term lease?

A. I will tell you, I should qualify that in one way, that these applications come in, they go directly to our division engineer, and he handles them for processing. Once the processing is complete, they come to me for approval.

So to my knowledge, I don't know of any pending.

Q. Are these long term or short term leases?

A. All of ours are short term leases.

Q. They are short term leases?

A. Yes.

Q. 30 day cancellation?

A. Yes.

Q. You don't know how much you have approved or how many you have approved?

A. I don't.

Q. You would characterize it as several, though, rather than a few, wouldn't you?

A. We are speaking of between Kankakee and Morents, aren't we?

Q. Yes.

[fol. 236] A. Truthfully I don't remember of one now. Probably I shouldn't even say that but I don't recall one.

Q. You don't recall approving any?

Mr. Murphy: He said he didn't recall any, your Honor. I object to this. It is beyond the scope of the direct examination.

Exam. Dahan: Objection sustained. Do you have any further questions, Mr. Freeman?

Mr. Freeman: I have a couple.

By Mr. Freeman:

Q. You have a per diem cut off time at midnight to make your interchange, do you not?

A. Yes, right.

Q. Do you ever miss that?

A. Yes.

Q. Are you familiar with the New York Central's deliveries to Cargill which is served by the Northwestern? You did not mention that in your testimony as one of the elevators, but I take it you do have such a—

A. I have on my Exhibit 23, "Cargill Elevator, 122nd & Torrence Avenue, C. & N. W."

Q. That is the elevator to which I refer. Now in your testimony you did not refer to the nature of the movement to that facility.

Are you familiar with that operation?

A. To the extent that the empty cars are given to the [fol. 237] Indiana Harbor Belt Railroad at Gibson.

Q. And then what happens to it?

A. The Harbor delivers them for us.

Q. To the North Western?

A. Truthfully I couldn't even say that.

Q. How about cars delivered out of Englewood?

A. Those go to Indiana Harbor Belt's Elevator Yard.

Q. Do they go to South Chicago first?

A. No. These are cars going to the Indiana Harbor Belt Railroad. They would go to South Chicago if they were going to the Rock Island, but to go to the Indiana Harbor Belt they go to Indiana Harbor Belt's Elevator Yard and from there to the Michigan Avenue Yard where the interchange is made between the New York Central and the Indiana Harbor Belt, and then the Belt takes those cars to Gibson and switches them at Gibson.

Q. Are they taken from Gibson to Burnham?

A. I am not that well acquainted on that.

Q. You are just not intimately familiar with that?

A. Not with the Harbor operations, no, sir.

Mr. Freeman: That is all.

Redirect examination.

By Mr. Murphy:

Q. Can you tell us what yard trains from Chicago that have moved through Schneider to Kankakee would be placed in at Kankakee?

[fol. 238] A. West yard.

Q. West yard. Is that the same yard in which the cars moving from the west end go to when they reach Kankakee?

A. That is correct.

Q. Would the operation on cars from Chicago arriving at West Yard so far as classification is concerned be the same as the operation you described in response to Mr. Freeman's questions?

A. That is right.

Q. Now Mr. Legg asked you to describe how cars are handled from the time they come into the yard until the time the train moves out?

A. Yes.

Q. What operation were you describing there? Did you have any particular yard in mind at that time?

A. West Yard.

Q. Is that a normal rail operation that you described?

A. Yes.

Q. Do you know whether the elevators on the Kankakee Belt do their own coopering or do you have coopering crews that labor on it?

A. Will you repeat that?

Q. Who coopers the corn cars loaded on the Kankakee Belt, if you know?

A. At Kankakee by our forces.

[fol. 239] Q. At the stations west of Kankakee on the Kankakee Belt where corn is originated, who coopers the cars, if you know?

A. If there is any done, it would be the elevator operator.

Q. Who installs the grain doors?

A. The elevator operator.

Q. Do you have a division—do you have a situation there where empties at elevators in Chicago are marked for return to the owning railroad?

A. Oh, yes.

Q. Can such cars be loaded for an eastbound movement out of that elevator?

A. Yes.

Q. Can they be loaded for an eastbound out of that elevator or then must they be returned to the owning railroad?

A. Well, if they are marked "Return," they would have to be returned.

Mr. Murphy: That is all I have.

By Mr. Bradford:

Q. Mr. Reynolds, is the southern district of the New York Central—does it have a terminus at Kankakee?

A. Yes, they do.

Q. Do they operate through freight trains from Kankakee to Indianapolis?

[fol. 240] A. Yes, they do.

Q. On grain originating on the Kankakee west line for Indianapolis, do you deliver it to this southern district at Kankakee or do you take it to Schneider and then south?

A. I believe you are correct that grain for Indianapolis is taken directly over to the southern district yard at Kankakee.

Q. I understood you to say that it was taken to Schneider and then—

A. I did say that.

Q. I thought you were mistaken.

A. What you say is right. I am sorry about that.

Recross examination.

By Mr. Chartrand:

Q. Insofar as what you do relay to Danville and Paris, does that still stand?

A. Yes.

Mr. Chartrand: That is all.

Exam. Dahan: Witness excused.

(Witness excused.)

Offers in Evidence

Exam. Dahan: Any objections to the receipt in evidence of Exhibits 22 through 24?

With no objection, the exhibits will be received in evidence.

(Applicant's Exhibits 22 to 24, inclusive, Wit. Reynolds, received in evidence.)

[fol. 241] Exam. Dahan: We will recess for ten minutes.

(Brief recess.)

Mr. Murphy: I would like to recall Mr. Reynolds for one question on redirect.

Exam. Dahan: Very well.

THOMAS E. REYNOLDS having been previously duly sworn, was examined and testified further as follows:

Redirect examination.

By Mr. Murphy:

Q. Mr. Reynolds, you were asked on cross examination whether or not you ever missed getting foreign cars off your railroad by midnight. That is foreign cars that you give to the other railroads at the interchange points?

A. Yes.

Q. Can you give us an indication of how often that occurs?

A. We miss about 10 per cent of the time.

Q. Can you state for the record the principal reason why you miss that service?

A. Late connection on the train from Elkhart, and then on occasion there is a disruption of service.

Mr. Murphy: That is all I have.

Recross examination.

By Mr. Freeman:

Q. What determines the time that the train leaves Kankakee?

[fol. 242] A. We have connection cars coming from Elkhart, and those cars have to be assembled from that train

in the proper groups for setting out, and then it depends on the time that that one arrives when the other one can be called, rather than have those cars miss and lay over for 24 hours.

Q. Does the number of stops that you make between Kankakee and Streator on your Streator Turn make a difference in the elapsed time between Kankakee and Streator?

A. There is a difference, yes.

Q. Now—

A. It does not account for missing connection there.

Q. What would be the elapsed running time between Kankakee and Streator with no stops?

A. An hour and 15 or 20 minutes.

Q. An hour and 15 or 20 minutes?

A. Yes.

Q. And you leave on that run at what time? What time do you normally leave Kankakee?

A. 11:00 a.m.

Q. And you sometimes miss connections?

A. Because the train is late from the east.

Q. What is the latest that you leave?

A. And make the connection?

Q. Yes.

[fol. 243] A. 12:00 o'clock; we can still make our connection by leaving at noon.

Q. Make your connection at Streator?

A. Yes.

Exam. Dahan: What time are you trying to make?

The Witness: 1:15 p.m.

Exam. Dahan: What is the connection time?

The Witness: They are good enough to give us up until 2:00 o'clock.

By Mr. Freeman:

Q. If you have any stops between Kankakee and Streator, you can't make it if you leave at 12:00, can you?

A. That is correct.

Redirect examination.

By Mr. Murphy:

Q. Do you have interchanges to make between Kankakee and Streator on that train?

A. If there is some time to make them, yes.

Q. With other railroads?

A. With other railroads, yes.

Mr. Freeman: That is all.

Mr. Murphy: That is all.

Exam. Dahan: You are excused, Mr. Reynolds.

(Witness excused.)

Exam. Dahan: Call your next witness.

Mr. Leiper: I would like to call Mr. John E. Gibbons.

[fol. 244] JOHN E. GIBBONS was sworn and testified as follows:

Direct examination.

By Mr. Leiper:

Q. Please state your name.

A. John E. Gibbons.

Q. What is your occupation?

A. Grain dealer and elevator operator.

Q. State the name and location of your company.

A. The Frank Gibbons Grain Company. We have grain facilities at Sunbury, Illinois on the New York Central Railroad and at Nevada, Illinois on the Gulf, Mobile & Ohio Railroad.

Q. How long has your company been in operation?

A. For forty years.

Q. Describe the business your company conducts?

A. We store seed, seed corn and grain for both the Government and private and individuals, and, of course, we buy and sell grain.

Q. What is the bushel capacity of your elevator located on the New York Central?

A. 20,000.

Q. Will you describe one complete operation of your elevator?

A. We buy the corn from the farmer; the farmer shells it and hauls it to our elevator. We weigh, elevate and [fol. 245] grade the corn, and then load it into box cars and ship to the purchaser.

Q. During the period 1954 through 1956, how many carloads of free corn were shipped via the New York Central?

A. None.

Q. During this period did you cease the commercial elevation of corn?

A. Yes, we ceased it because the prices at the river elevators dictated the corn be trucked directly to the river.

Q. Did your company, during this period, purchase corn for elevation at the river?

A. Yes.

Q. Was that corn moved direct from the farm to the river by truck?

A. Yes.

Q. Who bears the expense of trucking the corn from the farm to either the country elevator or the river elevator?

A. The farmer in both cases.

Q. During the period January 1, 1957 to August 30, 1957, did your company load cars with free corn for shipment via the New York Central from your Sunbury elevator?

A. Yes. The 5½ cent proportional rate published by the New York Central enabled our company to compete with [fol. 246] the river elevators and handle the corn ourselves.

Q. What effect did the discontinuance of the 5½ cent rate on August 30, 1957 have upon your business?

A. We were forced to cease the loading of rail cars at Sunbury and to purchase corn only for elevation at the river.

Q. What is the extent of the area within which your company purchases corn?

A. Approximately five miles in each direction from our elevators.

Q. Did this area increase as a result of the publishing of the 5½ cent rate?

A. No.

Q. In your opinion did the fact that during 1957 your company was able to ship corn via the New York Central harm your competitors' business?

A. In my opinion it did not.

Q. In your opinion is the 5½ cent rate necessary to enable your company to ship corn via the New York Central?

A. Yes.

Q. Is the farmer benefited by the 5½ cent rate?

A. Yes. When the 5½ cent rate is effective, the price offered to the farmer for his corn is derived from competitive bids and he receives a better price for his corn.

[fol. 247] Q. Would the cancellation of the 5½ cent rate have any effect upon your investment in your Sunbury elevator?

A. Yes, it would have a harmful effect.

When we purchased the elevator at Sunbury, we installed a new scale, a new conveying auger, and a new belt for cups and made many other costly improvements.

We made these improvements in reliance upon the continuance of the 5½ cent rate. Cancellation of the rate will make it difficult, if not impossible, to realize any benefit from our expenditures.

Mr. Leiper: That is all we have on direct. The witness is available for cross examination.

Cross examination.

By Mr. Hayes:

Q. What do you mean by "free corn"?

A. Free corn is what we refer to as corn that is not sealed with the government program. It is available for the open market.

Q. The rate factors that you have been discussing, would they have any effect on the way the unfree corn moves, what transportation it takes?

A. The unfree—in other words, the stored corn for the government?

Q. Yes.

A. No, not to my knowledge.

[fol. 248] Q. Do you know where this corn goes when it goes to the river from around Sunbury?

A. Well, we have definite commitments and contracts with the river elevators, the different river elevators; when it leaves the farm we know exactly to which river elevator that is going.

Q. With what river elevators did you have such contracts?

A. We have had contact with Continental at Seneca and Morris; the Blidden Company at Seneca, Cargill in Morris; Norris Grain Company in Morris, Illinois; Illinois Grain Terminals in Morris.

Q. Under those contracts, was corn handled through your elevator that moved to those river elevators that you have named?

A. No, the corn that went to the river elevators went from the farm directly to the elevators on the river.

Q. But you acted as a purchaser of that corn and then that corn that your elevator purchased went to the river elevator, is that right?

A. That is correct.

Q. In other words, you did business in that grain of the kind that you described?

A. Yes.

Q. How long did you do that kind of business?

A. Well, I myself have been—

[fol. 249] Q. That is what I mean, you personally.

A. Yes. From a period of 1946 until January of 1957.

Q. Are you still doing business that way?

A. Not on corn shipments.

Q. Is there any elevator with which you are in competition at Sunbury that is located on the rails?

A. I think possibly it may be safe to say that any grain elevator that is in the proximity of my territory is possibly a competitor. There are elevators up and down the New York Central from me in both directions.

Q. There is no other grain elevator than yours which is located at Sunbury?

A. No. If I misunderstood you, I am sorry.

No, I am the only one at Sunbury.

Q. You mean there is no other elevator at Sunbury than your own?

A. That is right.

Mr. Leiper: That is what he means, Mr. Hayes.

Mr. Murphy: The answer is no? Has he said so? I wanted to get his meaning.

By Mr. Hayes:

Q. And you refer to other elevators that would be competitors of yours that are located up and down the New York Central as on the rails, if I understood you correctly, did I not?

A. Yes, that is correct.

[fol. 250] Q. That is on the New York Central Railroad?

A. Yes.

Q. Those were the competitors you were speaking of in your direct testimony when you said it had not hurt their business as a result of this rate?

A. No, I had reference to any competitor of mine in that respect.

Q. Well—

A. I mean, in other words, if I could alter that, my competitors aren't all on the New York Central.

Q. Where are these other competitors than those that are located on the New York Central?

A. Well, other competition is anywheres close to our facility, Blackstone, Odell.

Q. How far is that.

A. I would say that is approximately 8 miles.

Q. May I interrupt you?

A. Certainly.

Q. Does that elevator at Blackstone, does it or doesn't its management make any arrangements for the shipment of grain via the New York Central on this 5½ cent rate?

A. I couldn't say whether they have or not. I list them as a competitor in trying to answer your question. They are really quite a ways from it.

Q. It really wouldn't be your competition?

[fol. 251] A. No.

Q. Actually your only real competition is the elevators up and down the line of the New York Central, that would be true, would it not?

A. I would say so in corn.

Q. Now you referred to elevators on the river owned by Glidden, Cargill, Norris, Illinois Grain and one other one.

A. Continental.

Q. Continental. If I recall correctly, you said that you had handled grain for shipment to those elevators, referring to your elevator now?

A. Yes.

Q. Was that a profitable business for you?

A. Yes, it was profitable.

Q. These river elevators, are they, the five you mentioned, owned by different companies?

A. To my knowledge they are, sir.

Q. Are they all trying to accumulate grain?

A. You mean are they in search of business, is that it?

Q. That is the idea.

A. Yes.

Mr. Leiper: Mr. Examiner, I must object to that question. It involves a knowledge that this witness does not have.

[fol. 252] Mr. Hayes: This witness has done business with them.

Exam. Dahan: If he doesn't have the knowledge, he can just say he doesn't.

Mr. Leiper: If you don't know, just say "I don't know."

By Mr. Hayes:

Q. Well, Mr. Witness, do you know? If you do know, please tell me.

You know, as a matter of fact, that those river elevators are in competition with each other for the accumulation of grain through your contact with them, do you not?

A. Well, I have absolutely no way of knowing what they have in mind at that.

Mr. Hayes: I have no further questions.

Cross examination.

By Mr. Legg:

Q. Mr. Gibbons, what is the greatest distance from your elevator from which you have received any corn since the 5½ cent rate went into effect?

A. I think to answer that I would have to cite an example that is terrrifically out of the ordinary. I would say that approximately it is 9 miles or 9½, but the reason that grain came that far to our elevator was that the contractor who installed our new scale owned this ground out there, and in appreciation for our having him put in the scale, he sold me the grain.

Q. What is the next farthest distance, then?

A. I would say five to six miles.

[fol. 253] Q. Do you know that certainly or is that a guess?

A. No, that is no guess.

Q. Who operates the elevator at Blackstone?

A. It is a farmer owned elevator.

Q. Is it located on another railroad than the New York Central?

A. Yes.

Q. What railroad?

A. The G. M. & O., a branch of the G. M. & O.

Q. Are there any other elevators out there not on the New York Central and not including the one at Blackstone within a distance of 10 or 12 miles of your elevator?

A. Would you state that again?

Mr. Legg: Read it.

(Question read.)

The Witness: Yes, there is one at Odell; there is one at Kinsman; there is one at Dwight.

By Mr. Legg:

Q. Dwight is on the New York Central. You mean there is an elevator at Dwight which is not on the New York Central?

A. Yes.

Q. Who operates that elevator?

A. Scott is the man's name.

Q. Would you expect in the normal course of business that any elevator in the country area such as yours would [fol. 254] draw grain from a radius of about five miles around, five or six miles around the elevator?

A. Well, not necessarily in a circle. I think it probably depends upon perhaps the individual and the proximity that he is to an area. I mean, in other words, if I could clarify my statement, if you have two elevators here, what you wonder, if there is one here and there is one here, and they are 10 miles apart, would they both just exactly do five miles of business, or five or six miles of business—

Q. Five or six miles of business as you say you do.

A. Well, I think there would be some interlap in there one way or the other, but I think that probably their radius would be right close to that.

Q. If they were closer together than 10 miles, there would be more overlap than in the radius of their operations?

A. Yes.

Q. How far is it? How far is your elevator at Sunbury from Morris and from Seneca?

A. From Seneca it is about 24 miles; from Morris I would say it is about 24 or 25 miles.

Q. When did you enter into the commercial elevation of corn again after the 5½ cent rate went into effect?

A. You mean the first time that it went into effect?

Q. Yes, sir.

[fol. 255] A. Well, that would be January 1957.

Q. You started commercial elevation, then, in January?

A. Yes.

Q. When did you become the owner of the Sunbury elevator?

A. In January 1957.

Q. When you began commercial elevation again, did you do that on a bid from some buyer for the corn?

A. Well—

Q. Who would then require it to be transported along the New York Central track?

A. You mean in January?

Q. Yes.

A. When we started to ship corn on the rail?

Q. That is right.

A. You wish to know if we had a firm bid from somebody, some buyer on the rail?

Q. That is right, before you began elevation.

A. Yes, we did.

Q. What knowledge do you have of the business done by the river elevators at Blackstone and Odell and at Scott Grain at Dwight?

A. I have no knowledge of their business capacity.

Q. Nor of the business which they have done in the past?

A. No.

Q. Nor of the business which they are now doing?

[fol. 256] A. No.

Mr. Legg: I have no further questions.

Cross examination.

By Mr. Freeman:

Q. Where is Nevada in relation to your Sunbury elevator?

A. The branch of the G. M. & O. is a mile south of the New York Central. Sunbury is located four miles west of Dwight; Nevada is located five miles west of Dwight on the G. M. & O.

Q. Is your Nevada elevator in operation now?

A. Oh, yes.

Q. So that does it transfer grain from that elevator to your Sunbury elevator?

A. No. There really isn't that need. They are too close together for that. If we purchase corn it is hauled directly to the Sunbury elevator.

Q. Now you are shipping from Nevada to Chicago on the G. M. & O.?

A. No. We at present aren't handling any corn through our Nevada facility.

Q. It is not in commercial operation?

A. Yes, it is in commercial operation. There is also other things: there is also oats and beans.

Q. But no corn?

A. No corn, that is correct.

[fol. 257] Q. Did you ever move corn out of there?

A. Yes, we have.

Q. You have moved corn out of Nevada. When was the last time you moved corn commercially out of your elevator at Nevada?

A. Free corn?

Q. Yes.

A. I can't recall.

Q. But you have moved free corn from your Nevada elevator?

A. Yes. I say—I will say maybe back around 1946.

Q. And that was corn that moved to Chicago?

A. No, that corn, if I recall correctly, went to Kellogg's at Battle Creek.

Q. You are just talking about sporadic movement now or a substantial movement?

A. Right, that is correct, a rather out of the way proposition that we would ship corn via the rail, but it happens at that time.

Q. So that it is fair to say you have just had no substantial commercial operation with your Nevada elevator of corn?

A. As far as corn coming in to the elevator and going out on the rail, no we haven't had any.

Q. Now at your Sunbury elevator you buy exclusively from the farmer, or do you buy from other elevators?

[fol. 258] A. We buy exclusively from the farmer.

Q. You mentioned that the sales to the river were profitable. Were your sales and your operations on the New York Central more, less or the same so far as profitable operations are concerned?

A. I will say that there is—I will say they are at least as good; I think they are better.

Q. Are you taking into account the fact that as you have explained in your testimony, that you are elevating the corn, putting it into your elevator, whereas I understand from your testimony that you did not do that when you shipped to the river?

A. That is correct.

Q. What is correct?

A. The fact that I have taken that into consideration.

Q. This is because of the difference in spread between what you can pay the farmer and what you can sell the corn for in Kankakee or elsewhere?

A. Yes.

Q. And that determines the profitability of your operations?

A. Yes.

Q. Measured against the cost to you, whatever that may be.

A. Yes.

[fol. 259] Q. Does your elevator own or operate any trucks?

A. No.

Q. Where is the nearest temporary portable loading facility to your elevator of which you are aware on the New York Central?

A. I believe the closest one is at Reddick.

Q. At Reddick?

A. I believe so.

Q. Who operates that?

Mr. Leiper: If you know.

The Witness: I don't know who it is.

By Mr. Freeman:

Q. How far are you from Dwight?

A. Five miles at Sunbury; six at Nevada.

Q. There is a portable loading facility so far as you are aware at Dwight, is there?

A. There is; there has been.

Q. At Dwight?

A. Yes.

Q. Is there also an elevator on the New York Central at Dwight?

A. Yes.

Q. Are the portable loading facility and the elevator operated by the same people, owned by the same people?

A. No.

Q. When you sell grain to the river, or when you did sell [fol. 260] grain to the river, did you know what the ultimate destination of that grain was?

A. No.

Q. I would like to address a few questions concerned with service to your elevator.

How often are cars set out at your elevator?

A. They are set out whenever I order them. I order them before they are set out.

Q. You order them from the freight agent who is located where?

A. Dwight.

Q. Normally do you order one or two cars?

Mr. Leiper: I object. Mr. Examiner, I must object to this as going beyond the scope of the direct examination. I believe counsel is on a fishing expedition. If he wants to establish anything, he should do it by his own witness. He is going beyond the scope of the direct examination, Mr. Examiner.

Exam. Dahan: What are you proposing to develop, Mr. Freeman?

Mr. Freeman: It seems to me that in the light of the evidence we have had so far from the New York Central witnesses themselves with respect to the service characteristics, that the question of the cost of the service is looming rather large in this proceeding.

[fol. 261] As opposing counsel well knows, these are not the kind of facts that we can develop. These are facts either within the knowledge of the New York Central or of the elevators located along the New York Central, and I think it would be very helpful to the record to have in the record facts as to the kind of service that we are talking about here.

My questions are addressed to that matter.

Mr. Murphy: Your Honor, we are anxious to make a complete record, but when the cross examiner exceeds the scope of the direct examination, he should make this witness his own witness, if he wants to go beyond it.

Exam. Dahan: If the New York Central wants to be deficient in any part of the record, it is up to them. In other words, it is their burden of proof and if you don't think they are putting in a complete record and haven't sustained the burden of proof, that is another thing.

I think you ought to confine your cross examination to the direct evidence.

Mr. Erickson: Mr. Examiner, in the direct examination the witness was specifically asked concerning the loading of cars at Sunbury, and it certainly is pertinent to the loading of cars as to the furnishing of cars for loading.

[fol. 262] Mr. Leiper: That has nothing to do with operations, Mr. Examiner.

Mr. Erickson, I am sure you are well aware of that.

Mr. Freeman: I have asked the question, the objection has been made, and I understand it has been sustained. I will not pursue that matter further.

No further questions.

Mr. Chartrand: Mr. Examiner, I would like to ask a couple of questions and then defer to Mr. Erickson to pick up with this witness.

Exam. Dahan: Very well.

Cross examination.

By Mr. Chartrand:

Q. You indicate that prior to the establishment of this 5½ cent rate you operated an elevator at Nevada?

A. Yes.

Q. Where did your corn move from the Nevada elevator?

A. Well, it didn't. It moved from a farm to the river.

Q. To the river?

A. Yes.

Q. A great majority of the business?

A. All of it.

Q. All of it. Now upon the establishment of this 5½ cent rate, you acquired the elevator at Sunbury, or shortly after, January of '57?

[fol. 263] Mr. Leiper: I object to the question in the form in which it is worded. I think that perhaps you had better reword it.

Mr. Chartrand: I will restate it.

By Mr. Chartrand:

Q. I understand you acquired the elevator at Sunbury in January of 1957?

A. Yes.

Q. You still did business at Nevada?

A. Yes.

Q. But not corn business?

A. No.

Q. The corn business that you did do, where did it move to?

A. The corn business that we did after the first of January was shipped to the New York Central.

Q. Any to the river?

A. No.

Q. Then we have a situation, if I understand you correctly, where prior to the establishment of the 5½ cent rate, everything went to the river?

A. Correct.

Q. Then after the establishment of the 5½ cent rate, everything went to the New York Central?

A. Yes.

Mr. Leiper: Would you specify—

[fol. 264] Mr. Legg: Would you specify, Mr. Chartrand, whether you are referring to corn?

Mr. Chartrand: Corn business, yes.

The Witness: Corn, yes.

By Mr. Chartrand:

Q. Now you indicated a little something about oat and bean business, sir, that you have at the two elevators there at Nevada and Sunbury.

Do you prefer one elevator over another insofar as oat business is concerned?

Mr. Leiper: Mr. Examiner, I don't believe this witness—we are not here concerned actually with the business other than corn.

Exam. Dahan: Objection overruled.

Mr. Leiper: I think it should be restricted to corn.

Mr. Chartrand: He indicated—

Exam. Dahan: I overruled the objection. He may answer.

(Question read.)

The Witness: The only grain that we handle at the elevator on the New York Central is corn. The oat and bean

business is done or has been done strictly through our Nevada facility.

By Mr. Chartrand:

Q. If you wanted to load beans on the New York Central, that would be in about an equal position with your Nevada elevator insofar as transportation is concerned?

[fol. 265] A. Yes.

Q. Insofar as beans are concerned, you have no preference insofar as a price standpoint is concerned whether you handle it at your Nevada elevator or your Sunbury elevator?

The price is the same at both country elevators?

A. Yes. There is a matter of the physical aspect of the two elevators.

Q. Yes, surely, I mean if you were—

A. I mean if I were to truck beans out of Nevada, it is much easier for me than to truck them out of Sunbury with the present facilities, I don't believe that I would do it.

Q. Is the country track price the same on oats at both elevators?

A. Yes.

Q. I believe you indicated that there is some direct relationship between the price at a country elevator like Nevada or Sunbury, the relationship between that and the rail rate.

Mr. Leiper: Wait a minute. Would you mind repeating that question?

Mr. Chartrand: I refer specifically to his statement at the bottom of page 2 where when the 5½ cent rate is effective, the price offered for his corn is derived from [fol. 266] competitive bids and he received a better price for his corn.

By Mr. Chartrand:

Q. You mean a better price than prior to the establishment of the 5½ cent rate?

A. No. I mean he receives a better price now that the rate is in. I mean daily.

Q. If we raise that to 15 cents tomorrow, it would affect the price, wouldn't it?

A. Oh, certainly.

Q. And it did affect the price when it went in initially, didn't it?

A. Yes.

Mr. Chartrand: That is all. Thank you.

Cross examination.

By Mr. Erickson:

Q. Mr. Gibbons, there are just a few additional questions.

In these 40 years that you have been operating an elevator, if I understood your answers correctly, all but the period from January 1957 forward was confined to Nevada, Illinois, is that correct?

A. That is correct.

Q. You state, as I understand it, that you did at that time deal in all of the grains such as beans, corn, and so forth, at the Nevada facility?

Your statement appears "We store seed, seed corn, grain, [fol. 267] and so forth," on page 1?

A. Yes.

Q. You did that prior to January 1957, too, did you not?

A. Yes.

Q. Now that is storing; there is no corn movement through there?

On the answer you just gave, there is no corn movement prior to January 1957 through or from your Nevada elevator in any of the prior years back to 1946 to the River, is that correct?

Didn't you do corn business before January 1957?

A. Yes.

Q. Other than direct farm to river hauling?

A. No.

Q. All of it was direct farm to river hauling, is that correct?

A. That is correct.

Q. None of it in your house.

I believe you stated the distance of 24 to 25 miles to the river was the figure. What is the trucking cost to the river?

Mr. Leiper: Mr. Examiner, we have not gone into trucking costs on direct and I don't believe it is proper cross examination.

Exam. Dahan: If he knows, he may answer.

[fol. 268] Objection overruled.

By Mr. Erickson:

Q. You have testified that you do not use your own trucks to transport to the River. Do you transport by a contract motor carrier?

A. Yes.

Q. What is the charge of the transport motor carrier in transporting corn from first Nevada to the River?

A. Well, from Nevada or the approximate area around there, the cost is 4 cents a bushel.

Q. 4 cents a bushel, and what would be the story with respect to Sunbury to the River?

A. It would be the same.

Q. Are the distances from the two points as you have indicated been about a mile apart, about the same to the River?

A. Yes.

Q. 24 to 25 miles?

A. Yes.

Q. Now do you know or do you have knowledge as to whether or not these contract motor carriers that you employ have their tariffs on file with the Illinois Commerce Commission?

A. Yes, they do.

Q. So that the charge is a charge that is published and on file with the governmental body?

[fol. 269] A. Yes.

Q. Is it within your knowledge that the reason for that is that they are subject to regulation on Illinois traffic whereas they would be exempt carriers on interstate traffic?

Mr. Leiper: I believe that calls for a conclusion of law on the part of the witness. I don't believe he is qualified

for that, Mr. Examiner, and I therefore object to the question.

Mr. Erickson: He has attested to the fact they are on file, and I will withdraw the balance of the questioning on that score.

By Mr. Erickson:

Q. Now is it within your knowledge that grain is sometimes handled since this 5½ cent rate came in through a New York Central elevator for the account of an elevator not located on the New York Central?

Mr. Leiper: Read that question.

(Question read.)

Mr. Leiper: Are you speaking of someone's business other than this witness' business?

Mr. Erickson: That is correct. I will be more specific, sir.

Exam. Dahan: I think the question is clear; the witness may answer.

The Witness: I don't handle any. I don't know of any [fol. 270] others that handle any.

By Mr. Erickson:

Q. Your answer is, then, that you do not handle for any other party and you do not know of others.

You attested to the fact that before entering upon the purchase of the New York Central facility in January of 1957, you did have a profitable business in dealing directly with the River, but I don't find that you have set forth for the record how that is done.

I would like to interrogate just a moment on that point, sir.

When a shipment is made from a farm to a River elevator, is it done for your account at the River elevator?

A. Yes.

Q. Is the settlement made by the river elevator with the farmer?

A. No.

Q. Or with you?

A. With myself.

Q. Is that based on the river elevator's bid at the river elevator location?

A. Yes.

Q. Do you in turn make settlement with the farmer for the amount paid at the river less the amount of the trucking cost to the river less your commission or handling as you may describe it?

[fol. 271] A. No.

Q. And remit to the farmer a net amount?

A. No, I can't say that that is all correct, because we don't take the trucking out unless the farmer wishes us to. He pays the trucking, but sometimes they will pay it themselves and other times they will ask us to take it out for the trucker.

Q. Would this be a correct question, then, that you make settlement for the price of the grain to the farmer less your handling cost, and including the trucking cost, if he has requested you to handle it in that manner?

A. Yes.

Q. If he has not made that specific request, the only difference in the procedure would be in the assessment of the trucking costs which would be paid direct to the trucker from the farmer, is that correct?

A. Yes.

Q. I believe some other party had made inquiry of you concerning the loading by a mechanical loading device at Dwight. How many elevators are there at Dwight, do you know?

A. Yes, I know. How many actual elevators or how many actual companies?

Q. Companies handling grain through a facility located on the railroad, either G.M. & O. or New York Central.

[fol. 272] A. There are two grain companies in Dwight.

Q. There are two grain companies, and one of those companies is located on the New York Central, is it not?

A. Yes.

Q. Are you leaving the presumption from the statement that there was mechanical loading, that the other elevator at Dwight, Illinois was loading through a mechanical loading device?

A. No, I made no presumption.

Q. Then it is some third party other than this other elevator that may have done that, is that correct?

A. That is correct.

Q. And you have knowledge of that?

A. Yes.

Mr. Erickson: That is all.

Exam. Dahan: Any redirect?

Mr. Leiper: Yes.

Redirect examination.

By Mr. Leiper:

Q. Mr. Gibbons, in buying corn for sale at the river, did you buy any south of the New York Central?

A. Did I buy grain south?

Q. Buy grain south of the New York Central?

A. Yes.

Q. In the movement of that corn that was purchased [fol. 273] south of the New York Central, what railroads were crossed in trucking that to the River?

Are you familiar enough with that area to tell us that?

A. Yes. We crossed the G.M.&O. and the New York Central to get to the River, and then I believe there is another one over at Ransom. I can't tell you which line that is.

Q. Let me make the record clear by this question on the matter of the corn which moved direct to the River: Was there any elevation on the part of your company of the corn which was trucked directly to the River?

A. No.

Mr. Leiper: That is all.

Exam. Dahan: Witness excused.

(Witness excused.)

Exam. Dahan: We will go to lunch now and come back at 1:30.

(Whereupon, at 12:30 o'clock p.m., a recess was taken until 1:30 o'clock p.m. of the same day.)

[fol. 274] AFTERNOON SESSION

Exam. Dahan: Come to order please. Is the applicant ready to proceed?

Mr. Leiper: Yes.

Exam. Dahan: Call your next witness.

Mr. Leiper: I will call Mr. Edward Cahill.

EDWARD CAHILL was sworn and testified as follows:

Direct examination.

By Mr. Leiper:

Q. Please state your name.

A. Edward Cahill.

Q. What is your occupation?

A. Grain Buyer.

Q. Will you state the name and the location of your company?

A. Cahill Grain Company, Budd, Illinois.

Q. How long has your company been in operation?

A. Eighteen years.

Q. Describe your company and the business it conducts.

A. We are buyers of country run grain. We have grain elevator and flat storage capacity of 300,000 bushels. Our elevator is located on the New York Central Railroad.

Q. Since your company is located on the New York Central, has it been your practice in the past to ship most of your corn via that railroad?

[fol. 275] A. No. While it would seem logical that we would ship our corn via the New York Central, the fact of the matter is that until December of 1956, we were unable, because of the high rail freight rate, to do so. During the entire period 1954 through 1956, we shipped only 20 cars of free corn. There were many months during which we made no rail shipments of corn at all. We could afford to ship by rail only when the river elevators were not making us a bid. The rail bids were so low that they afforded no competition whatsoever to the river bed.

Q. During the period 1954 through 1956, how did you ship the corn which you purchased?

A. Most of it was trucked direct from the farm to the river elevator. For instance, in 1956—75% of the corn we purchased moved in that manner.

Q. Did your company make regular and substantial shipments of free corn via the New York Central during the period January 1, 1957 through August 28, 1957?

A. Yes.

Q. Will you explain why your company was able to make these shipments?

A. Yes. The New York Central published a rate on corn of 5½ cents. We then received more reasonable rail bids which we were able to accept. With this rate available, we were able to compete with the river elevators and elevate [fol. 276] and ship the corn ourselves.

Q. Does your company compete with elevator companies aside from the river elevators?

A. We compete, to a certain extent, with the elevators at Blackstone and Ransom, Illinois.

Q. Have you an opinion as to whether your increased rail business in 1957 harmed the business of these elevators?

A. In my opinion, it did not. For the most part we purchased our corn from the same producers within the same area as we did in previous years.

Q. Who bears the expense of trucking the corn from the farm to your elevator and from the farm to the river elevator?

A. The producer in both instances.

Q. From farms in your area, is the trucking expense to the river elevator greater than to your elevator?

A. Yes, because the distance is much greater.

Q. Does the farmer receive any benefit from the rail bids based on the 5½ cent rate?

A. Yes. For the first time in many years, the bidding for corn became competitive because of the 5½ cent rate. As there are now two or more buyers bidding for the same corn, the price offered to the farmer will reflect the better bid.

Q. In your opinion, is the 5½ cent rate necessary to en- [fol. 277] able your company to ship corn via the New York Central?

A. Yes.

Mr. Leiper: The witness is available for cross examination.

Cross examination.

By Mr. Hayes:

Q. When the corn from the area in which you buy goes to the river to what elevator does it go.

A. It all depends, sir, where the producer would like to have it go. Continental Grain and Glidden Elevator are the closest two.

Q. And what is the distance from your elevator?

A. Approximately 15 miles.

Q. To each of them.

A. Yes sir

Q. Did your company purchase that corn from the farmer.

A. Yes sir.

Q. Referring to the 75% of corn that your company handled prior to December 15, 1956 which you say went direct from the farm to the river elevator—

A. Yes sir.

Q. Did the farmer from whom you purchased it nevertheless indicate what elevator it was to go to.

A. In some instances, yes.

Q. Was that a profitable business for you.

A. Yes sir.

[fol. 278] Q. With respect to that corn that was so handled by your company prior to December 15, 1956 and the same percentage of your business that since then been elevated by your company and moved by New York Central, which was the more profitable to your company, the way you were handling it before December 15, 1956 or the way you are handling it now.

A. Oh, approximately the same.

Q. Well, if one is better, which is it.

A. I wouldn't say any one was better.

Q. As to the 75% of corn that you elevated, I beg your pardon, as to the 25% of corn that you elevated prior to December 15, 1956 when this 5½ cent rate went in, how did that move.

A. We'd take that into the elevator, sir, to sell out as feed and so on.

Q. Locally.

A. Yes sir.

Q. Did you hear the last witness testify.

A. Yes sir.

Q. You mean the same thing by free corn as he did.

A. Yes sir.

Q. What means of conveyance was used for the corn that went to the river prior to the time when this 5½ cent rate went in and corn did move.

[fol. 279] A. I didn't get the question.

Q. There was some corn moving to the river before they put in this 5½ cent rate from the area from which you buy.

A. Yes sir.

Q. And after that rate went in, then you didn't move any more corn to the river.

A. Oh, yes, we have moved some where maybe the trucking rate would be the same or it may be a little more to get it to our elevator than it would to the river or something like that.

Q. Would you read me that answer.

Mr. Leiper: Read the question too.

(Record read.)

By Mr. Hayes:

Q. What is the truck rate from your elevator to the river elevator of Continental Grain Company.

A. Three cents.

Q. A pound.

A. A bushel.

Q. And is it the same from your elevator to the Glidden Company's elevator.

A. Yes sir.

Q. Do you use farmers' trucks or hired truckers.

A. Hired truckers.

Q. Contract carriers or common carriers.

[fol. 280] A. Common carriers with local permits.

Q. Well, common carriers with local permits, you mean their rates aren't filed with the Illinois Commeree Commission.

A. They are filed with them, yes sir.

Q. How far away from you is the elevator at Blackstone.

A. About 4½ miles I would guess.

Mr. Hayes: If Your Honor please, I object to counsel for the New York Central coaching the witness.

Mr. Leiper: Mr. Hayes, I merely showed him Exhibit No. 1.

Mr. Hayes: That should not be done while the witness is answering a question and I object to it.

Mr. Leiper: I apologize, Mr. Hayes.

Mr. Hayes: I don't want your apologies, I just don't want you to do it any more.

By Mr. Hayes:

Q. Would you answer please.

A. 4½ miles.

Q. Is that located on any line of railroad.

A. It is on the G. M. & O.

Q. Do you know whether the elevator at Blackstone has purchased any corn for movement to Chicago since this 5½ cent rate went in.

A. No sir, I would have no way of telling.

Q. But you have.

[fol. 281] A. We have bought corn, yes, not to Chicago I wouldn't say, sir, but to Kankakee and some places like that. I don't think we have shipped any to the best of my knowledge, we haven't shipped any to Chicago.

Q. And where is this elevator at Ransom, how far is that from your elevator.

A. Oh, about 5 miles.

Q. Is that on a railroad.

A. Santa Fe.

Q. Do you know whether that elevator at Ransom has done any corn business since this 5½ cent rate went in.

A. I couldn't say, sir.

Q. Well, do you know whether the elevators at Blackstone and Ransom did business in corn of any kind before the 5½ cent rate went in.

A. I couldn't say, sir. I presume they did.

Q. You presume they did.

A. Did and do now, but I wouldn't have no way of telling.

Q. Then you really don't know what their corn business was before this 5½ cent rate, or what it has been since then.

A. No sir.

Q. You have no basis for an opinion on that.

A. No sir.

Q. Are the river elevators of the Continental Grain Co. [fol. 282] and the Glidden Co. in competition with each other for the accumulation of grain.

A. Yes sir.

Mr. Hayes: I think that's all.

By Mr. Legg:

Q. Are you an employee of the Cahill Grain Company.

A. Yes sir.

Q. How long have you been employed by the company.

A. Since 1946.

Q. You say that you are now purchasing from the same producers in the same area you previously did.

A. Yes sir.

Q. Did you formerly compete for those same producers with the Blackstone or Ransom elevators? Did you compete for business from those producers.

A. Yes sir.

Q. And sometimes the producers would sell to you and sometimes to the other elevators.

A. That's right.

Q. And that period formerly is before December 15, 1956.

A. Yes sir.

Q. When did you start buying corn on the basis of the New York Central 5½ cent rate.

A. I think it was in January of '57 if I am not mistaken.

Q. Did you receive a bid at that time? Is that what [fol. 283] started the purchase on that basis.

A. Yes sir.

Q. From whom did you receive the bid.

A. Well, different ones, Cargill Grain Company, Payne Stotler, Illinois Grain Service.

Q. That was in January of 1957.

A. Yes sir.

Q. Do you know whether these same producers from which you have bought during this period are now selling to the elevators at Blackstone and Ransom.

A. I couldn't say, sir.

Q. Do you know that formerly they did.

A. No.

Q. On occasion.

A. Sure, they can go wherever they please to.

Q. Do you know how the prices which you have bid on the basis of 5½ cent rate have compared with the prices bid by Ransom and Blackstone.

A. No, I wouldn't know that.

Q. Would you know whether they were higher or lower.

A. No, I would not.

Mr. Legg: I have no further questions.

By Mr. Freeman:

Q. Mr. Cahill, you mentioned in your testimony that you moved corn from January 1 to August 28, 1957. Did you move any corn from Budd in the last couple months.

[fol. 284] A. Have we.

Q. Yes.

A. Yes sir.

Q. How much.

A. I don't know but I'd say 25, 30 cars.

Q. Beg your pardon.

A. 25 to 30 cars I'd say approximately.

Q. In addition to being an elevator operator, are you also a Grain Buyer or Broker.

A. No, sir, just a Grain Buyer from the country run grain.

Q. What has been the destination of your sales in the last couple months on the New York Central, Kankakee?

A. Yes sir, and Indianapolis, Indiana.

Q. Is that wet corn or corn which had gone through your dryer.

Mr. Leiper: I object to the question on the basis that it assumes he has a dryer.

Mr. Freeman: I shall ask a question prior to that to solve it.

Mr. Leiper: It is beyond the scope of the direct examination. Are you sticking to that one question, Mr. Freeman.

Exam. Dahan: Objection overruled.

By Mr. Freeman:

Q. First I'll lay the ground work and ask him if he has [fol. 285] drying facilities.

A. Yes sir.

Q. When were those put in.

A. At the start of the corn season.

Q. Approximately when did you begin operating.

A. Three months ago.

Q. Now my question is were you selling wet corn or corn which had been dried in your elevators.

A. Some of each, sir.

Q. Some of each.

A. Yes sir.

Q. Some of each to Kankakee.

A. Yes sir.

Q. Some of each to Indianapolis.

A. Yes sir.

Q. You don't load corn at any other place than Budd.

A. No sir.

Q. Your testimony indicates you have a storage capacity of 300,000 bushels. Is that storage capacity in any measure for CCC grain.

A. Yes sir.

Q. What proportion of that storage capacity is for CCC grain.

A. 250,000.

Q. 250,000.

[fol. 286] A. Yes sir.

Q. Is that stored in what are referred to as tin cans.

A. Flat storage, flat storage buildings.

Q. That's Butler cans.

A. No, they are Butler buildings but they are not cans. That's two different types.

Q. So you have an elevator capacity of 50,000 bushels for free corn.

A. Yes sir.

Q. Have you had the capacity for free corn for some time or has there been a change in that? Have you built new facilities in addition to your drying facilities.

A. No sir.

Q. Do you buy exclusively from farmers or do you also buy from other elevators.

A. No, only in one or two cases where they want it dry, all others is from farmers.

Q. The wet corn you sell would be exclusively from farmers, when it is dry it may or may not be from another elevator.

A. That's right.

Q. Do you know the ultimate destination of corn that you sell delivered or to move via the Kankakee belt.

A. No, I wouldn't, sir.

Q. In the time in which you have been associated with [fol. 287] Cahill Grain Company did you ever have a substantial movement of corn via the Kankakee belt.

A. No sir.

Mr. Leiper: Could I have that question read.

(Question read.)

Mr. Leiper: Will you specify the period.

Mr. Freeman: Prior to December 15, 1956.

The Witness: I said no, we never shipped hardly any before 1956.

Mr. Freeman: Mr. Examiner, so we may be clear I again have a series of questions with respect to the service characteristics. Do I correctly understand that I ask these questions and if the objections were made that the objection would be sustained.

Exam. Dahan: Operating questions.

Mr. Freeman: Yes, concerning service characteristics of this witness.

Mr. Leiper: Of the railroad.

Exam. Dahan: In other words what you want to do is go on a fishing expedition.

Mr. Freeman: No, I want to ask this man about the service characteristics at his elevators of bringing in empties, taking out loads. I am asking you if I ask that same series of questions as I proposed asking the last witness, if objections were made they would be sustained.

[fol. 288] Exam. Dahan: Well, you ask the question and let the objection be made.

By Mr. Freeman:

Q. How many empty cars do you usually order at a time.

A. It all depends on the amount of grain we have bought, at the present one to five, sometimes one car, sometimes five.

Q. How long is it from the time you order a car until you get the car.

Mr. Leiper: Mr. Examiner, I would desire at this time to place an objection to this line of cross examination on the ground it goes beyond the scope of the direct testimony.

Exam. Dahan: Objection overruled.

Mr. Freeman: Will you read the question.

(Question read.)

The Witness: Well, it all depends on when you order it. You can order it this afternoon and it will come in this evening some time.

Q. Has that been true all during the past two months.

A. Yes sir.

Q. Does the west bound or east bound train drop the empty at your elevator.

Mr. Leiper: Mr. Examiner, I wish to object to that. This has been covered by a New York Central operator [fol. 289] witness who was the proper person to testify.

Exam. Dahan: Objection sustained.

Mr. Freeman: I have a series of further questions now that I would like to ask along this same line. I don't want to go through the motions of asking them if there is going to be an objection each time.

Exam. Dahan: Do you have any questions as to what the operating witness has said.

Mr. Freeman: Yes, I think in many respects the testimony of the operating witness was grossly inadequate as to the specific kind of service on this road.

Mr. Hayes: We share that feeling strongly.

Mr. Murphy: The operating witness was here and available for cross examination. They had him as long as they wanted him and I object to characterization of the operating witness' testimony and I don't think it is proper for them to attempt to go into a line of cross examination on a witness here who has not testified about railroad operations. He is testifying about the operations of a country elevator.

Exam. Dahan: There may be testimony brought out by a witness, not an operating witness that may discredit the testimony given by the operating witness. The objection is sustained.

Mr. Hayes: You pointed out that testimony might be [fol. 290] brought out that would discredit the other witness and you are sustaining the objection?

Exam. Dahan: He doesn't know what the railroad does.

Mr. Hayes: At his elevator he does.

Mr. Murphy: Not necessarily, Your Honor, he is in the grain business. We had an operating man in the transportation business this morning and if they had any doubt about what he had to say they could have asked him questions, they asked him enough as it was. They had him a long time.

Mr. Hayes: And we consistently got the answer "I don't know about that".

Mr. Freeman: I am only asking the witness questions that I assume are in his knowledge. If he doesn't know he can certainly say so.

Mr. Murphy: It is certainly beyond the direct testimony.

Exam. Dahan: I sustained the objection.

Mr. Freeman: In that case I have no further questions.

By Mr. Chartrand:

Q. Mr. Cahill, if I understand your testimony correctly, prior to the establishment of this 5½ cent rate the corn went predominantly to the river.

Minneapolis Board of Trade, Evans Building Company

A. Yes sir.

Q. Then after the establishment of the 5½ cent rate it moved predominantly by the New York Central.

[fol. 291] A. Yes sir.

Q. Now when the 5½ cent rate was put in, did it affect the price of corn at your elevator?

A. Not to a great extent, no. They could get corn trucked to our elevator cheaper than they could go the extra miles to the river elevator.

Q. Was your bid on a New York Central track higher than after the establishment of the 5½ cent rate?

A. Yes sir, I believe it was.

Q. Now I'd like to consider for a moment the price of the river, the river bid and your New York Central bid just before the establishment of the 5½ cent rate. Which one was the highest?

A. The river, sir.

Q. On an average of about how many cents a bushel?

A. Oh, I don't believe I could answer that, sir, correctly.

Q. Ten cents a bushel?

A. Oh, no, no.

Q. One cent a bushel?

A. No, it would be more, I'll guess and say three to four cents.

Q. All right, three to four cents. Then if it was corn in your elevator, you or the producer had to bear the cost of trucking to the river, is that right?

[fol. 292] A. The producer does.

Q. Did you ever have any grain from your elevator trucked to the river?

A. Yes, sir.

Q. Did you bear the expense of that?

A. We have a truck, sir.

Q. You have a truck. Then the cost of operating that truck or the cost of having it hauled to the river was borne by you?

A. Yes sir, in that instance.

Q. In that instance. Now therefore the river price met your elevator would in fact be the river bid less the cost of the trucking?

A. That's right.

Q. All right. Now after the 5½ cent rate went into effect, which was the highest, the river bid or the New York Central bid?

A. The river bid would still be somewhat higher, but it still couldn't, I won't say as good as the rail bid because trucking wouldn't be as much to our elevator.

Q. I am just talking about bids.

A. The river elevator was higher, it still is.

Q. Taking the first six months of 1957 when this 5½ cent rate was in full swing, what was the relationship between the river bid and the New York Central bid?

[fol. 293] A. It varies, sometimes the river bid is highest and sometimes the New York Central is highest. I couldn't say for six months.

Q. As an average which would be the highest?

A. I'd say they are about even, sometimes one is ahead of the other and vice versa.

Q. Let's assume for a moment they were in fact even, there would have to be deducted from the river bid the trucking to the river?

A. Yes sir,

Q. I believe you indicated it was about 3 cents a bushel?

A. Approximately, yes, it all depends on the miles.

Q. Therefore the Budd price based on a river bid would be 3 cents less than the New York Central bid per bushel?

A. Would you say that again, sir?

Q. I will put it this way. The river bid and the New York Central bid are exactly the same, let's say $1.30 but since you have to stand the 3 cents over to the river it really means $1.27 in your elevator if it goes to the river or $1.30 New York Central track price.

Mr. Murphy: When you talk about a river bid are you talking about a bid in trucks at the river and in rail cars?

Mr. Chartrand: When I say river bid that is weighed down at the rail.

[fol. 294] Mr. Murphy: Truck?

Mr. Chartrand: Yes. I approach it this way, he has grain in his house and he makes an election—

Mr. Murphy: I just wanted to make a clarification.

By Mr. Chartrand:

Q. Then what I said in this hypothetical question where the two prices are the same and there is 3 cents for trucking to the river, corn at your elevator if it went to the river was worth $1.27 whereas if it was loaded in a box car at the New York Central it would be worth $1.30?

A. Yes sir.

Mr. Chartrand: Thank you.

By Mr. Erickson:

Q. Mr. Cahill, just one or two additional questions. Were you here when I interrogated the prior witness?

A. Yes, sir.

Q. In the construction of the price to the farmer, the bid to the farmer where it is trucked direct to the river prior to the 5½ cent rate, would his statement be approximately the same as yours?

A. Yes sir, I imagine it would.

Q. The mechanics would be the same?

A. Yes sir.

Q. The only difference would be a matter of mills depending on miles?

[fol. 295] A. Yes sir.

Q. I notice you said you have your own truck?

A. Yes sir.

Q. Is that used only for trucking from your elevator?

A. Yes sir.

Q. You don't use it for trucking from the farm?

A. No sir.

Q. Are you also a contract carrier with tariff on file with the Illinois Commerce Commission?

A. Yes sir.

Q. So that the trucking charge that is made or is considered in a river delivery is an amount which is published and on file with the Illinois Commerce Commission?

A. Yes sir.

Q. So it is a standard amount. In getting a river bid is that based on some standard such as say No. 2 yellow corn?

A. Yes sir, that's the only bid we ever receive.

Q. So whenever we talk about bids we are talking about a recognized Government standard of No. 2 yellow corn and with respect to the New York Central Kankakee bids as you described them that would be the same, would it not?

A. Yes sir.

Q. In your direct testimony you referred to increased rail business. What was your volume of business in the [fol. 296] year 1957, total volume of shipments, I am not talking storage now, I am talking shipments?

A. I Just couldn't say, sir.

Q. What was your volume in 1956?

A. I'd have to look on the record, sir, I couldn't tell you.

Q. Can you from your general knowledge of management say that '57 was equal to or greater than '56?

A. I wouldn't say it was any greater.

Q. You would say it was approximately the same, so that when you made the statement to the effect that you didn't hurt your competing elevators located on other railroads, that wasn't based on any knowledge of what their volume was then or later?

A. No sir, to the best of my knowledge we haven't.

Q. So you have no specific knowledge as to whether they have been hurt or not been hurt?

A. They have never complained to me if they have.

Q. I noticed in reply to one question you said when you order cars you get from one to five empties as you request them. How much side track facility do you have alongside your elevator, how many cars will it hold?

A. Oh, approximately six I'd say.

Q. You could hold as many as six cars?

A. That's a guess, sir.

[fol. 297] Q. So any cars you order would come and be placed right at your facility?

A. That's right.

Q. Then as you load it you would use your own mechanical means of moving one loaded car to another position?

A. That's right.

Mr. Erickson: That's all.

Exam. Dahan: Any redirect?

Mr. Leiper: Yes.

Redirect examination.

By Mr. Leiper:

Q. Mr. Cahill, does your company prefer to ship rail rather than sell your corn at the river?

A. Yes sir, I'd say we do.

Q. And is that because your company likes to perform the normal operation?

Mr. Hayes: Just a moment, I object to the leading and suggestive form of the questions to his own witness. Ask him why.

By Mr. Leiper:

Q. Why, Mr. Cahill?

A. We have never had any trouble getting box cars and we can load when we feel like it. When the river elevator can't get barges or the river flows over, they have to have you wait a day or two or a few days.

Q. Would the trucking rate from certain of the farms from which you have drawn your corn be less than 3 cents [fol. 298] per bushel?

A. From our—

Q. From the farms from which you draw your corn?

A. Sometimes it is more, sometimes it is less. It depends on the mileage.

Q. It depends on the mileage?

A. Yes sir.

Q. I believe you stated, I am not sure, I believe you stated in your direct testimony the area which you considered to be your trade area, is that correct?

A. Yes sir.

Mr. Freeman: What was the answer?

The Witness: Yes sir.

Mr. Leiper: Yes, he has so stated.

By Mr. Leiper:

Q. Upon what do you base your opinion that your rail business has not harmed the business of your competitors?

A: To the extent that they have never come over and complained to us or to me.

Q. Do you assume that your competitors have their own trade area?

A. Yes sir, I do.

Q. Have you encroached upon your competitors' trade area?

A. Not to our knowledge, I haven't.

Q. I believe you stated in answer to certain cross exam- [fol. 299] ination that you deduct the expense of trucking from the price to the farmer when it goes to the river, when the corn goes to the river?

A. It all depends if the producer wants us to or not.

Q. How about corn which comes from the farm to your elevator for rail shipment?

A. Same way.

Q. It is there deducted as well?

A. They pay for it but sometimes they pay it personal to the truckers, sometimes they leave it with us.

Q. You mentioned some corn which came to your elevator which was eventually trucked to the river in your truck. Had you acquired title to that corn, was it your corn?

A. Yes sir, we bought it.

Q. You purchased it? You were questioned also with respect to your volume in 1956. Had you any volume at all in 1956?

A. Oh, the usual amount. It is probably the same as '55. It will vary from year to year one way or the other.

Q. Let me call your attention to your direct testimony. Can you state again what your volume was through the period 1954 to '56?

A. What was that question again, sir?

Q. I withdraw that last question: Mr. Cahill, has the distance, I should say the relative distance to the river [fol. 300] or to the New York Central any bearing upon whether the corn will move either to the river or to the New York Central?

A. Well, sure, the mileage, if it is 15 miles from our elevator to the river where maybe the producer only lives a mile from our elevator or 3 miles or something like that.

Mr. Leiper: That's all I have.

By Mr. Bradford:

Q. Mr. Cahill, in answer to a question on cross examination you named several firms from which you received bids in 1957. One was Cargill, was that bid from Cargill for rail shipment or—

A. Both, sir, they have both bids.

Q. Did you actually sell corn to Cargill for rail shipment?

A. Yes sir.

Q. Do you know the destination of that corn?

A. No, I couldn't say offhand.

Q. You also stated you shipped corn, you had a rail movement from your station to Kankakee and Indianapolis?

A. Yes sir.

Q. Now the shipments you made to Indianapolis, were they sold on direct bids from Indianapolis or did somebody order it there?

A. A broker ordered it there, sir.

[fol. 301] Q. A broker in your territory?

A. He lives in Kankakee, sir.

Q. And he represented an Indianapolis firm and bought for them and ordered shipment, is that a fact?

A. I would say that's right, sir.

Q. And as to those shipments you received the full rail price delivered Indianapolis, or was it track price or station?

A. He gives us a track price our station, what we will receive for the corn.

Mr. Bradford: That's all I have.

Mr. Murphy: I'd like one question. Mr. Chartrand questioned you in regard to bids and included in his question was the assumption that the bids were being made on corn that was then in your elevator. Is it the usual practice to handle the corn through your elevator before it moves to the river elevator?

A. No sir.

Mr. Murphy: Thank you. That's all.

Mr. Schier: I have one question, if I may, Mr. Examiner. Mr. Cahill, when you truck corn from the territory north

of Budd to the river elevators, you did that for profit, didn't you?

A. We don't truck from the producer ourselves.

Q. You do not truck from either the farm to the river or [fol. 302] from the farm to the rail elevator?

A. No sir, not with our own trucks, sir.

Mr. Erickson: I have two questions on recross in light of a statement which the witness made.

Recross examination.

By Mr. Erickson:

Q. You said in response to a question that you purchased corn that you trucked, in the purchase of the corn did you take into consideration this trucking cost, published trucking charge from your elevator at the time of entering into this purchase agreement? In other words did you charge off the amount of trucking cost in the purchase of that corn?

A. To the producer?

Q. To the producer.

A. No sir, I give him a price delivered at our elevator.

Q. Delivered at your elevator, and the price delivered at your elevator is determined how? This is prior to the New York Central rates.

A. Whatever commission we feel we should take.

Q. And you did not include the cost of moving that grain from your elevator to the river?

A. Yes, we deducted that, trucking charge plus our commission.

Q. So am I correct in saying when you purchase corn to be trucked at your elevator you took into consideration [fol. 303] the trucking cost or charge as published from your elevator to the river in arriving at a basis of bid to the farmer less your commission?

A. Yes sir.

Q. All right now, second question. You stated that you do not truck from the farm to the river. Do you have

knowledge of what the trucking charges are on a direct movement from farm to the river?

A. No sir, it varies according to miles that the producer lives.

Q. Is the rate for a comparable distance of 15 miles for example the same when it is from the farm to the river as it is from the elevator to the river?

A. Yes sir.

Q. Exactly the same?

A. To the best of my knowledge it is.

Q. If it were not, then you would stand to be corrected, if the tariff would show otherwise?

A. Yes sir, I think it is approximately 3 cents a bushel.

By Mr. Freeman:

Q. I don't know if the record is clear as to what Mr. Cahill has said with respect to what he considers to be his normal buying area and I would like to ask one question on that. Have you stated what you consider to be your normal drawing area and if so what is it?

[fol. 304] A. I'd say approximately 5 miles, maybe not in all cases.

Mr. Freeman: That's all.

Exam. Dahan: Do you have any questions, Mr. Hayes?

Mr. Hayes: Yes sir.

By Mr. Hayes:

Q. You mentioned two elevators, one owned by Continental Grain and one by Glidden on the river. Where are they located?

A. Seneca, Illinois.

Q. Both at Seneca?

A. Yes sir.

Q. You said something about the river freezing. When did you last actually see the Illinois River frozen?

A. I can't say that I ever saw it, but they called and said—

Q. Never mind what somebody called and said to you. These elevators at Seneca of Continental Grain and Glidden, did they have storage capacity?

A. Oh, I couldn't say how big their elevator was, sir.
Q. Who are your present competitors?

Mr. Leiper: Mr. Examiner, he has stated already on his direct testimony where his competitors were located.
Mr. Hayes: He named two, I want to know where the others are.
Mr. Leiper: When does cross examination end? This is certainly not responsive to anything I asked on redirect.
Exam. Dahan: This is recross. Do you have any other [fol. 305] competitors?
The Witness: Mr. Gibbon, sir.
Mr. Hayes: Is that the gentleman that testified just before you?
The Witness: Yes sir.
Mr. Hayes: That's all.
Exam. Dahan: Any further questions of this witness? You are excused, Mr. Cahill.

(Witness excused.)

Exam. Dahan: Call your next witness.
Mr. Leiper: Mr. Hoyle.

Benjamin G. Hoyle was sworn and testified as follows:

Direct examination.

By Mr. Leiper:

Q. Please state your name.
A. Benjamin G. Hoyle.
Q. Mr. Hoyle, are you the President of the Farmer's State Bank of McNabb, Illinois?
A. Yes, I am.
Q. How long have you been associated with the Farmer's State Bank?
A. 44 years.
Q. Are you a resident of McNabb?
A. Yes.
Q. Do you own a farm as well as being associated with [fol. 306] the Farmer's State Bank?

A. Yes sir.

Q. Where is that farm located?

A. West of McNabb.

Q. About how far?

A. One is a mile west and one is a mile south.

Q. Is that two farms?

A. Yes.

Q. How long have you resided in McNabb or in that vicinity?

A. 44 years.

Q. Mr. Hoyle, how would you characterize McNabb and the surrounding area?

A. I would characterize it as being an agricultural community dependent largely upon the production and sale of the products of agriculture for its livelihood.

Q. Is the production and sale of corn important to your community?

A. Yes, it is. McNabb is in Putnam County. Putnam County grows and sells more corn than any of the other field crops. In my opinion, the welfare of our community hinges in large part upon the ability of the farmer to produce and market his corn and especially upon the price which he receives for his corn.

Q. Have you an opinion, Mr. Hoyle, as to whether the farmer would benefit from competition in the bidding for [fol. 307] his corn?

A. Yes. When the only bid which the country elevator receives is from the river elevators, the latter can control the price which the farmer will receive. When there are bids based on different factors from two or more sources the price to the farmer will generally be higher. For many years the farmers in our community were unable to get the best price for their corn because freight rates dictated that corn must move to the river. When the corn moved to the river the farmer had to bear a greater trucking expense thereby diminishing the profits from the sale of the corn. However when the New York Central reduced its rate, other sources for bids were opened up and the corn was then trucked the shorter distance from the farm to the country elevator and the farmer was able to retain more of the profit from the sale of the corn.

A. Oh [illegible]hen, that the farmers in your com-
Q. W [illegible]he 5½ cent rate?

M[illegible]
his [illegible]is available for cross examina-

[illegible]nation.

By Mr. Hayes:

Q. How close is this farm of yours west of the river [fol. 308] to McNabb?

A. One mile west.

Q. And how close is it to the nearest river elevator?

A. I'd say about 11 miles.

Q. Before December 15, 1956 where did you, to whom did you sell the corn that you raised on that farm west of the river?

A. I didn't sell any corn.

Q. You didn't sell any?

A. No sir, I fed it all.

Q. I see. Would that be true of your other farm?

A. Yes sir.

Q. You ship hogs and not corn?

A. Hogs and cattle.

Q. Where do you ship them?

A. Chicago.

Q. How do they get there?

A. Truck.

Q. Prior to December 15, 1956, Mr. Hoyle, to whom, what persons if you know was the corn raised in the area of McNabb sold to?

A. Prior to December 15, 1956?

Q. That's the date when this 5½ cent rate went in, prior to that to what persons was most of that corn sold?

A. Outside of what was sold to local feeders it would go [fol. 309] to the river elevators.

Q. What persons was it sold to?

A. Well, it would be Cargill, Illinois Grain I think it is, and Continental and W. W. Dewey and Sons, depending on the location of the farm.

Q. It would go a lot of it then or the greater part of it to the river to Spring Valley and to the south?

A. Spring Valley and Hennepin.

Q. Do you know which way that corn went, what its destination was after it got to the river?

A. No sir.

Q. You referred, sir, in your direct examination to the best price for corn. What is the best price for corn?

A. The best price, I just don't understand quite what you mean by that.

Q. You used the phrase, I was asking what you meant by it.

A. Well, we'll look and see. The best price is where it can be delivered for the least expense and receive the same price per bushel.

Q. And where was the best price for corn raised in the area of McNabb before this 5½ cent rate went in?

A. I would say the river.

Q. Is any of it still moving to the river?

A. I think so, some. I wouldn't be sure, I think so, yes.

Q. Mighty little.

[fol. 310] Mr. Leiper: Are you testifying, Mr. Hayes, or is that a question?

Mr. Hayes: The witness and I are getting along all right.

Mr. Leiper: I object to that if it is a question. It sounded like a statement to me.

Mr. Hayes: The witness understands me and so do you. The witness can answer the questions.

Mr. Leiper: There is an objection pending.

Exam. Dahan: I'll let him answer.

The Witness: I am not operating the elevator, I don't know where the corn goes.

Mr. Hayes: Thank you very much, that's all.

By Mr. Legg:

Q. When you say that the grain or corn in McNabb area was sold to the river elevators prior to December 15, 1956,

you meant that it was sold to the McNabb elevator or some elevator in the area which then sold to the river elevator?

A. Yes.

Q. And the McNabb elevator or the other elevator selling the corn to the river elevator would sell to the river elevator which would give him the best bid out of the bids made by the three or four river elevators named.

Mr. Murphy: I object, I don't understand it and it might be objectionable.

[fol. 311] Exam. Dahan: Read the question please.

(Question read.)

Exam. Dahan: I am going to ask you to re-frame the question.

By Mr. Legg:

Q. I withdraw that and ask this one. You have already stated that the sales were made to two or three or four named river elevators in your previous testimony, did you not?

A. Prior to a certain date.

Q. Prior to December 15, 1956, yes, and presumably the corn was sold by the elevator operator at McNabb or such other elevator operator as did purchase the corn and was re-selling it to the river elevator which made the highest bid of the elevators out of those three or four you have named.

A. Well, I think the farmer a lot of times designated the elevator to which his corn would go.

Q. Do you know on what basis he would make that designation?

A. One of them is a co-operative elevator and some farmers are very co-operatively minded.

Q. Do you know any other basis of designation?

A. No, not unless one elevator bid more than the other.

Q. One river elevator bid more than the other?

A. That would be the only reason I would think. I don't [fol. 312] know how they decide that, I didn't sell any corn.

Q. Would the McNabb elevator be the principal buyer of corn in this area for resale to the river elevator?

A. That's right.

Mr. Legg: I have no further questions.

By Mr. Erickson:

Q. Mr. Hoyle, I just have a question or two. Throughout the examination of these witnesses from the country they have indicated a rather narrow range of area in which they do business. Now as a banker located at McNabb, Illinois, how extensive is the area of your banking contact with them, in other words with your customers?

A. Well, that's—

Q. Does it extend much beyond McNabb?

A. I would say it extends beyond the range of the elevator.

Q. Would it extend over as far as Seneca?

A. Yes, in some instances.

Q. Now the purpose of my question is do people from these areas not located on the New York Central do business with your bank?

A. Some of them.

Q. And when you expressed your opinion that the farmers in your community are benefited by this rate, would that include elevator operators that are not located on the New York Central Railroad?

[fol. 313] A. I said it benefited the farmers more than the elevator operators.

Q. Do you have any people doing business with your bank that are located on these other lines?

Mr. Murphy: Do you mean farmers or elevator operators?

Mr. Erickson: I am talking elevator operators.

The Witness: Elevator operators that do business with us, we have none of them but the McNabb Grain.

By Mr. Erickson:

Q. So you have no knowledge as to whether competitors of elevators on the New York Central Railroad were or were not injured by this matter and your comments are strictly

confined to such farmers as can avail themselves of the New York Central.

Mr. Leiper: I object to the question on the grounds it goes beyond the scope of direct testimony. He has not stated in his direct whether or not this rate is harmful or beneficial to any grain elevator.

Mr. Erickson: Isn't the farmer and grain elevator in some degree at least one and the same?

Mr. Leiper: I don't want to argue with you, but I have an objection pending.

Mr. Hayes: Will you just read the question?

Exam. Dahan: The objection has been overruled. Is the witness able to answer the question?

The Witness: Would you repeat the question?

[fol. 314] Exam. Dahan: Was there a question?

Mr. Erickson: There was a question.

(Question read.)

By Mr. Erickson:

Q. Is that not so?

A. Do you say competitors located on the New York Central?

Q. Competitors of grain elevators located on the New York Central.

A. I wouldn't know whether they were hurt or not, I just don't know.

Mr. Erickson: All right, that's all.

Exam. Dahan: Any redirect?

Mr. Leiper: No further questions.

Exam. Dahan: You are excused, we'll have a five minute recess.

(Witness excused.)

(Short recess.)

Exam. Dahan: Come to order, please. Call your next witness.

Mr. Leiper: I'll call Mr. Noder.

Mr. Hayes: May I ask before counsel starts this next witness, may I ask a question for information? Are the rest of the witnesses that will be offered to the conclusion of today's hearing witnesses from country like the last three witnesses? In other words if that were the case I might not have to stay here.

[fol. 315] Mr. Leiper: No, that is not the case. There will be other witnesses of other categories.

Mr. Hayes: All right.

M. J. Noder was sworn and testified as follows:

Direct examination.

By Mr. Leiper:

Q. Please state your name.

A. M. J. Noder.

Q. What is your occupation?

A. I am the Manager of the McNabb Grain Company, Inc., located at McNabb, Illinois.

Q. Will you describe your company and the business it conducts?

A. Principally our company is a grain dealer, we buy and sell grain. We also sell feed, wire, coal and lumber. In addition, we do grinding for our customers. The company has been in operation for 44 years. Our grain elevator has a capacity of 25,000 bushels and is located on The New York Central Railroad.

Q. During the period 1954 through 1956, did your company elevate corn for shipment via The New York Central?

A. No free corn. The freight rate was so high during this period that we could not afford to ship our corn by rail. So far as corn was concerned, we became merchandisers. We purchased corn from the farmers for delivery and [fol. 316] elevation at the river elevators. For instance, in 1956, approximately 90% of the corn we purchased was trucked directly from the farm to the river elevator without any handling by our elevator. We elevated only what corn we needed for retail purposes.

Q. Were you able to ship your corn via The New York Central during the period January 1 through August 30, 1957?

A. Yes. By taking advantage of The New York Central 5½ cent rate, we were able to quote the farmer a price based on rail delivery, elevate the corn ourselves and load box cars for shipment via The New York Central. There were regular and substantial shipments throughout this period.

Q. Did your use of the 5½ cent rate during this period result in any expansion of the territory within which you normally purchase corn?

A. No. I estimate our territory to be approximately a 6 mile radius around our elevator. We did not draw our corn from beyond that area. In my opinion, we purchased very little corn during this period that we would not have purchased anyway for elevation at the river.

Q. What effect, if any, did the discontinuance of the 5½ cent rate on August 31, 1957 have upon your ability to load corn for rail shipment?

A. We were no longer able to load for rail shipment. We switched immediately to purchasing corn for delivery [fol. 317] and elevation at the river elevators.

Q. When corn which you have purchased is trucked from the farm to your country elevator, or from the farm to the river elevators, who bears the expense?

A. The corn will bear it, corn or farmer. Corn coming to our elevator is generally hauled in the farmer's own vehicle, while corn going to the river elevators is generally hauled in for-hire trucks. In either case, the expense for the hauling is borne by the farmer.

Q. Does any advantage accrue to the farmers when corn is purchased on the basis of the 5½ cent rail rate?

A. Yes. They are benefited by the fact that their price is no longer determined by a single bid but by competition between several bids.

Q. In your opinion, is the 5½ cent rate necessary to enable your company to ship corn via The New York Central?

A. Yes.

Q. Mr. Noder, could you tell us the various river points to which you sold corn in 1956?

A. Continental at La Salle, Cargill at Spring Valley, Illinois Grain at Hennepin, Dewey at Henry and I think one job in Lacon to Continental.

Mr. Leiper: The witness is available for cross examination.

Cross examination.

[fol. 318] By Mr. Hayes:

Q. Why didn't it all go to one elevator on the river?

A. Because I would send it to whichever one where the farmer would have the littlest hauling. If you are familiar with our site there we are just in the bend of the river and some of the corn can go to Henry, some can go to Hennepin, some to Spring Valley and some out east of town can go to La Salle and wherever, I about make the farmer call his own shot where he goes to. It doesn't make any difference to us because the price is most of the time the same between the four or five points that I go to.

Q. Some of the time there is a difference between the prices that are bid by the river elevators, some of the time?

A. Some of the time, you are correct in that.

Q. Are the river elevators at the points you mentioned in competition for the accumulation of grain?

A. Yes, I would say they are.

Q. Is there more than one elevator at McNabb?

A. No sir.

Q. While this 5½ cent rate was effective, did the grain in whose marketing you had a part go by New York Central?

A. Yes.

Mr. Leiper: I would ask that that question—

[fol. 319] Mr. Hayes: Just a minute, this is my cross examination, Mr. Examiner, and I object to interference.

Mr. Leiper: Mr. Examiner, just for clarification, he said grain instead of corn. I would like him to specify whether he meant grain or corn.

Examiner Dahan: I believe he meant corn, did he not?

Mr. Leiper: That's what I hope he meant.

Mr. Hayes: Yes. You so understood me, Mr. Witness.
The Witness: Corn, well, yes.

By Mr. Hayes:

Q. When this corn went to the river prior to the institution of the 5½ cent rate to some one of these several elevators, could you make a statement as to which elevators or elevator got the bulk of it?

A. Well, yes, I will. Cargill got the most I would say and probably Dewey second.

Q. Where is Cargill located?

A. Spring Valley.

Q. And who has the elevator at La Salle did you say?

A. Continental.

Q. Well, you take Cargill at Spring Valley and La Salle, the Continental Elevator, they would get the bulk of it from your area.

A. Continental at La Salle doesn't get too much because that's a little out of our territory.

Q. But there is some?

[fol. 320] A. Yes, we do buy some over east of us that can move to Continental at La Salle with less hauling, but mainly it goes to Hennepin, Spring Valley or Henry.

Q. How far east of you did you buy before the 5½ cent rate.

A. Oh, five, six miles, five miles I'd say.

Q. When you were buying corn before the 5½ cent rate was that corn elevated in your elevators.

A. No sir, only what we wanted to retail, what they needed to send back to the country, we would take that in there but the rest all went directly to the barge.

Q. Well you mean to an elevator on the river.

A. That's right.

Q. There was no direct loading at the barges from trucks that you know of.

A. I just don't understand. Yes, I think your river houses loaded direct from their trucks to the barges through their house.

Q. That's what I mean, it went through the house.

A. That would be the only way they could get it there that I'd know about.

Q. That's the only way I know of too. Now are there any temporary movable loaders around McNabb or have there been since this 5½ cent rate went into effect.

A. None that I know of.

Q. You mean none that you know personally.

[fol. 321] A. Well, there are just none.

Q. Do you know of any anywhere along the line of the New York Central.

A. Well, by the grapevine I have heard of it east of Streator out in that area. I don't personally know of any of that operation. I wouldn't say that there is but I have heard there is, what it amounts to I have no idea.

Q. You referred in your direct testimony to the time when an injunction went into effect as being at a time when you ceased to be able to ship corn on the New York Central. When that injunction went into effect and while it was in effect, do you know whether New York Central had any published rate for the movement of corn out of McNabb east bound that was not enjoined.

A. Well I think—

Q. Do you know now.

A. Yes, I was going to say I know they had one but I ain't agonna tell you what it is. I do know it was so high you just couldn't touch any corn going out of McNabb by rail. I know that.

Q. You know there was one.

A. Yes, I do.

Q. That was not enjoined.

A. That's right. In fact I used it a little at the end of the season when the barge couldn't take corn and I got [fol. 322] mad and I bought the corn and put it on rail at a penalty to him.

Q. How much was that rail.

A. I don't know, I sold the corn track McNabb, I never paid attention to the rate.

Q. What was the price.

A. The farmer got $1.06½.

Q. What was it at the river.

A. $1.08½ at the river at the same time if he could have got there with it.

Q. About 3½ cents difference.

A. Well, make it 2½. It was at a time when there was some demand for rail corn and the price was a little better than under normal conditions. I would say that.

Q. Tell me about that.

A. That's all I know.

Q. When was the time.

A. It was in October.

Q. Of what year.

A. 1957.

Q. And the 5½ cent rate was in effect then.

A. No, it was before that came back.

Q. What made the price better than it was at the river at that time to ship it by rail.

A. Somebody evidently wanted some corn. I don't even [fol. 323] recall where I shipped it to but it was one of the times when the barges got fouled up and didn't have any room and we couldn't go there with it and he wanted to get rid of his corn and he was willing to sacrifice some of his money and let me ship it.

Q. Have there been other such instances in your experience before the 5½ cent rate went into effect.

A. No that was, as I remember that would be the only free corn that I had shipped in years that wasn't applied to the 5½ cent rate.

Q. In other words the 5½ cent rate except in such instances when the river services for some reason were inadequate or unable to take it has been entirely moved off the river and on to the railroad by the 5½ cent rate for free corn.

A. Without it was located real close to the river, yes, I'd say you were about right.

Q. What do you mean by real close to the river.

A. Well, I buy some corn that the hauling would prohibit moving it from its location to our elevator, not very much, but I do get a little.

Q. And how close to the river—

A. Would that corn be?

Q. Yes.

A. It would raised within a mile of the river elevator.

Mr. Hayes: I think that's all.

[fol. 324] By Mr. Legg:

Q. I have a few questions. How far would this corn be from your own elevator that you talked about which was sold to the river elevators because of its proximity to them.

A. It would be a matter of 12 or 14 miles.

Q. Was the corn free corn that you described which was shipped in October on the rail the 1956 crop or 1957 crop.

A. '56.

Q. There was no 1957 crop moving at that time.

A. Not any of any consequence anyhow.

Q. Why was that.

A. Just wasn't ripe yet.

Q. Did your elevator have any difficulty in getting corn out from the farmers during the 1957 harvest season.

A. Difficulty getting corn from the farmers?

Q. Yes sir, was the harvest slow that year.

A. It was wet, let's say, now slow.

Q. It was wet.

A. That's right.

Q. Was it wet enough that it was not safe enough to ship at the time.

A. I didn't have any. Well, I think I run into one car that got into heating before it got to destination. The rest I got off in good shape.

Q. How much non-free corn did you ship prior to Decem-
[fol. 325] ber 15, 1956.

A. That would be government corn.

Q. Well, whatever you call non-free corn, you characterized corn as free corn.

A. Just off hand I don't remember, but approximately in 1957 a hundred sixty to eighty bushels I would say.

Q. That's in 1957.

A. That's what I shipped in '57 of government corn.

Q. About how much did you ship prior to December 15, 1956.

A. Oh, that's too far back for my memory. I wouldn't hardly venture a guess on that.

Q. Could you give me a statement for the year 1956 alone.

A. No.

Q. Could you estimate it.

A. It would be purely a guess if I did and I'd just as leave not guess on it.

Q. Would it be more or less than the amount shipped in 1957.

Mr. Leiper: Mr. Examiner, the witness said he didn't care to guess.

The Witness: No, I wouldn't care to guess on that. It would be purely a guess and it wouldn't be of any value to anybody if I did guess because I'd have to be in the office and look it up. I would say it was substantially less than in 1957. I'd put it that far for you and that's as far [fol. 326] as I'd want to go.

Q. Did you say the elevators on the river to which your elevator sold corn were on La Salle, Spring Valley, Hennepin and Henry.

A. That's right, in an instance to Lacon.

Exam. Dahan: Try not to volunteer. If you make voluntary statements you just bring on more questions.

Mr. Murphy: Thank you.

By Mr. Legg:

Q. Was this business profitable to your elevator.

A. Yes.

Q. I am referring to the business which you did with the river elevators prior to the effective date of the rate.

A. Yes.

Q. Was it more or less profitable than your business with the corn shipped via New York Central after the 5½ cent rate went into effect.

A. About the same, might do a little better by rail at times.

Q. Does anybody in the McNabb area make a bid to farmers for corn other than your elevator.

A. No.

Q. That was true before the 5½ cent rate went into effect and it is true now.

A. Yes.

[fol. 327] Q. How far west of McNabb will your elevator buy corn.

A. Not very far, we get to the river to quick, three, four miles.

Q. How far are you from the river at that point.

A. I think 6 miles.

Mr. Legg: I have no further questions.

By Mr. Freeman:

Q. Do you know the ultimate destination of the corn you sell to the river.

A. No.

Q. When you load a box car do you have to put a man in the box car to level it.

A. No.

Q. Can you tell us when you last were able to ship free corn on the Kankakee Belt before the 5½ cent rate was put into effect.

A. It was more than 20 years ago.

Q. More than 20 years ago. How full do you load box cars at your elevator.

A. What quality grain.

Q. I am talking about corn.

A. Wet or dry? Dry corn you can overload, wet corn you can't load them. Which are you referring to.

Q. Give me a figure for both.

A. It depends on the capacity of the car and its cubic capacity.

[fol. 328] Q. Do you get two size cars, generally 110 capacity, and the larger car.

A. You are liable to have 100 cap with more cubic capacity than you get in 110, so anywhere from 1,700 to 2,000 bushel is about a guess on these cars.

Q. Which figure is for wet and which figure for dry.

A. It would be wet. Dry corn you can overload.

Q. Wet corn you get from 1,700 to 2,000 bushels.

A. Right.

Mr. Freeman: That's all.

By Mr. Erickson:

Q. Mr. Noder, I was impressed with your statement that there's no shipment of free corn by the New York Central railroad because the rate was so high during the period that you could not afford to ship corn by rail. To my mind that presumes that there must have been some place from which you got a bid for New York Central delivery. Where do you receive your bids for New York Central track delivery.

A. Cargill, Dewey, and Payne Stotler.

Q. Cargill, we are talking about New York Central shipment.

A. That's right.

Q. Now as you receive bids from these parties from day to day on a given day do they generally amount to about the same or are there variances.

[fol. 329] A. It won't vary over a quarter of a cent. That would be about the limit unless somebody got off wrong and he'll be higher than that.

Q. As a general thing then—

A. They will be pretty close together.

Q. The price bid to you for New York Central delivery will be approximately the same from the different bidding parties located at different places.

A. Right.

Q. For track, station loading.

A. That's right.

Q. With respect to river bids prior to this 5½ cent rate, how did you find a bid on a given day at these different points you referred to, were they approximately the same.

A. Just about all the time they were the same.

Q. So it would be fair to say then that the bid price at La Salle or Spring Valley or Henry would be the same on a given day.

A. (Nodded).

Q. But they would vary from day to day, wouldn't they? In other words Thursday's bid may not be the same as Friday's bid.

A. That's right.

Q. But you have stated here that there is a freight rate of 5½ cents, that didn't vary from day to day, did it.

[fol. 330] A. The freight rate didn't.

Q. No, but that was the important thing in changing the direction of the flow from the river to the New York Central track loading, is that correct.

A. That's right.

Q. And the variances in the prices from day to day did not materially affect that, it was still New York Central load, Thursday, Friday or Monday, whatever the case might be.

A. That's right.

Q. Now I noted you made a statement here to the effect that your general radius was 5 to 6 miles before the 5½ cent rate and later I understood you to say you had a customer about a mile from the river and he was located about 12 to 14 miles from you, is that correct.

A. That's right.

Q. Do you have any other cases like that of customers that distance from you.

A. That's the only one I have that close to the river.

Q. Are there others beyond the 6 mile radius.

A. Not as a general rule. I do have them, yes, spotted here and there.

Q. Do you ever do any loading for any party other than yourself.

A. No.

[fol. 331] Mr. Erickson: That's all.

Mr. Leiper: Mr. Noder, with respect to those customers which lie outside of your general trade area, did you have those same customers before the 5½ cent rate was put into effect.

The Witness: Substantially, yes.

Mr. Leiper: That's all that I have, Mr. Examiner.

Mr. Schier: I have a question please. Is there any law that restricts elevator operators in the area from which you may draw corn.

The Witness: No.

Mr. Schier: It is generally then a gentleman's understanding, one elevator operator with the other, that you restrict yourself in to certain territories.

The Witness: Well, we have a good neighbor policy and I hope we abide by it. We do get corn out of our territory

and the reason is because we are a co-op and we pay a patronage dividend and it makes it rough on our competition, but that—I don't chisel on the prices to get the business.

Mr. Schier: Do you find that the river elevators more or less observe this same practice? Do you find for example that trucks travel greater distances to river elevators than they do in your area.

The Witness: Oh, they travel tremendous distances in [fol. 332] instances. I don't know how common a practice it is, but for instance one morning when one river elevator opened up he had trucks from four states setting in front of his elevator. I didn't see it but I visited with a guy over the phone and he tells me that so I am assuming it is the truth.

Mr. Schier: Well, from your common knowledge you would assume they truck great distances.

The Witness: I know they come from out-of-state. In fact I have sent grain back with the same truck that came out of Iowa.

Mr. Legg: You say that your customers are now substantially the same as they were before the 5½ cent rate went into effect.

The Witness: That's right.

Mr. Legg: If there is a difference is the difference an increase in the number of customers you have.

The Witness: Yes.

Mr. Legg: How much is that increase.

The Witness: It would be very small.

Mr. Legg: On a percentage basis what would you say.

The Witness: To tell you the truth I don't know how much business I did last year, but it wouldn't be 5% I am sure of that.

Mr. Legg: Thank you.

[fol. 333] Exam. Dahan: The witness is excused. Call your next witness.

(Witness excused.)

ARTHUR C. SCHIER was sworn and testified as follows:

Direct examination.

By Mr. Murphy:

Q. Will you state your name and business address, sir.

A. Arthur C. Schier, Vice President General Foods Corp., 250 North Street, White Plains, New York.

Mr. Hayes: Mr. Examiner, is the witness reading.

The Witness: I have notes before me that are pretty well scribbled up and most of it is extemporaneous.

Mr. Hayes: He was looking at his notes for his name, address and business, and I wondered.

The Witness: I assure you I know that quite well.

By Mr. Murphy:

Q. In what capacity are you employed by General Foods.

A. I am Vice President in charge of Traffic.

Q. Will you describe your functions in that position, Mr. Schier.

A. My function primarily is to develop philosophies and policies with respect to our area of assigned responsibility, give directions to and oversee the work assigned to my staff associates, to cooperate with several general managers of [fol. 334] the centralized divisions in their transportation problems, and to see generally that the affairs of the corporation in the area of my responsibility are conducted within the law.

Q. Will you please describe briefly your background and experience in the transportation field.

A. I have been Vice President of General Foods Corporation since 1942 and in the 12 preceding years roughly I was General Traffic Manager and Assistant General Traffic Manager for that company. In prior years I was associated generally in water transportation industry embracing waterways including the Illinois River, the Great Lakes, the New York State Canal, inter-coastal and worldly water routes.

Q. Will you state the position of your company in this proceeding and state the reasons for that position.

A. General Foods Corp. is here of course in support of the carriers.

Mr. Hayes: Which carriers.

The Witness: The New York Central.

Mr. Murphy: Perhaps you could defer your questions until after he has completed his statement, Mr. Hayes.

Mr. Hayes: The witness has answered.

The Witness: General Foods Corp. buys substantially 80 million dollars worth of transportation a year in the [fol. 335] delivery of its finished products and in the movement and assembly of its raw materials at our many producing plants throughout the United States, one of which is our corn mill division located at Kankakee, Illinois. We have long learned that we are dependent because of the needs, because of the fact that we are in national distribution for a dependable, strong, healthy national railroad transportation system, and we are interested wherever possible in contributing to the development of that particular industry. We are vitally interested in retaining our competitive opportunity to purchase our corn requirements in our normal geographic area. The New York Central railroad territory immediately west of Kankakee made possible by the publication of the 5½ cent rate on corn from stations on the New York Central west of Kankakee. Now three things have been accomplished since the effectiveness of that rate. First we can now buy corn competitively with the Chicago interests. Second, the railroads are again in business on the west end division and third we have restored the dignity of the local elevator operator once more. This freedom of competitive equality of purchase opportunity was denied to General Foods prior to December 15, 1956 by virtue of publication by the A. R. Mechling Barge Co. of rates from Illinois river points to Chicago.

Mr. Hayes: That's A. L. Mechling.

[fol. 336] The Witness: (continuing) ranging from 4¼ cents per hundred pounds to 5 cents. As outlined by Witness Tascik, elevators located on the Illinois River which parallel the Illinois Central on the north have attracted substantially all the free corn from New York Central and Illinois Central rail elevator stations to the river elevators by virtue of this low barge rate. Corn being bought in this

area on the basis of Chicago price less freight, naturally the river operators having access to barge operation and the low barge rates are in a position to receive truck corn while corn buyers such as ourselves attempting to purchase in this same area could before December 15, 1956 only avail ourselves of rail service and rates. We were penalized in our purchase program by the difference between the barge rates and the rail rates. Now we are unwilling to concede to the Chicago elevator houses that the territory immediately to the west of theirs belongs to them and to them alone divine right. We feel as a matter of fact that the low barge rate effective from this area has caused what is substantially a restraint of trade and I think it has been evidenced by some of the barge elevator operators here today that they have had quite singularly one bid and too frequently that same bid from different river elevator operators. Corn arriving in Chicago by barge may be re-[fol. 337] shipped without restriction from that point by rail, barge corn having the same price as rail corn with respect to rail re-shipping rates from Chicago. Kankakee not being on the Illinois River is dependent on rail service, the alternative to this rail service would be truck. However, truck corn unlike barge corn is not presently entitled to the application of the rail re-shipping rate east from Chicago. There are times, Mr. Examiner, when Chicago houses have as a matter of fact sold us corn, river corn, delivered to us at Kankakee while the 5½ cent rate was in effect at a price as low as we can buy it on the west end. I presume that has to do with the position that that particular grain house or elevator operator took or chose to take for his own reasons on that day. I don't know whether he offered that same price to others.

Mr. Tascik's exhibits showed quite clearly that the movement of corn from these Illinois River elevators into Chicago has progressively and substantially increased year after year since the barge service was created for the movement of corn back in I believe 1939. Once more, this corn does not belong to the barge line by any divine right. As a matter of fact I'm of the opinion that the Preamble to the Act imposes an obligation upon the Interstate Commerce Commission to preserve the inherent rights of each mode

of transportation, and by each I mean both rail and water, [fol. 338] and it is quite obvious that the water line has by far the land's share of this movement. The publication of this 5½ cent rate restoring to us and other buyers of corn the equality of competitive purchase opportunity has and undoubtedly will in the future mean that the river elevator operators will bid competitively with us and other buyers in this area for their corn requirements. As corn is bid more competitively in each elevator territory, each elevator operator, grain merchant, commission house and so forth enters into the market to buy his current requirements. The farmer benefits from this as has been quite clearly established. There are times when our Kankakee elevator is not in the market in this area. This permits others to purchase more advantageously on those days and the same situation could favor us when the river elevators are not in the market.

Now protestants have tried hard to create the impression that the 5½ cent rate is unduly and unnecessarily low, whereas we believe the fact of the matter is that the 5½ cent rate is actually higher than the barge rate with its range of 4¼ to 5 cents; as Witness Tascik, I believe it was yesterday, depicted that the railroad rate is currently 119% of the barge rate and in Ex Parte 212 now scheduled to become effective February 15th, the rate will be 124% of the barge rate. I should think it would be a fair handicap [fol. 339] in this sort of a raise for the barge line, quite fair. Corn may be trucked from the farm to either a river elevator or to a rail elevator. The mileage difference can have as many variables as there are farm locations. One could make examples of corn available on a farm immediately adjoining a river elevator. The trucking expense to that elevator would of course be lower than to a rail station 10 miles distant. Conversely the corn grown adjacent to the rail station would have exactly the opposite effect. Much has been said about the level of this rail rate, but little has been said about the level of the water rate. I wonder why this water rate established as low as it has been and as long as it has been has not been increased in the face of obvious rising operating costs. Certainly wages of tug captains and crews have been increased, certainly

costs of maintenance have gone up. Everything associated with any form of transportation has gone up and in my judgment far greater than this rate has been increased and I wonder too whether certain pressures are imposed upon this Mechling Barge Co. by perhaps some of its big shippers who are already well identified as barge operators in other waters, the Great Lakes, the Mississippi, the New York State Canal and High Seas if you please.

Mr. Hayes: Just a moment. Would you read me that [fol. 340] last sentence beginning with "I wonder"?

(Record read.)

Mr. Hayes: Thank you.

The Witness: It has been established that corn moving through a river elevator into barges is subjected to the same elevator costs as those attached to the movement of corn through a rail elevator into a box car. We believe the 5½ cent rate is competitively required to provide equality of purchase opportunity in this area, not only to us but to other buyers, and we will present a witness, Mr. Graves, director of purchasing of our corn mill division to give further substantiation to this opinion. We believe the 5½ cent rate to be compensatory to this railroad.

Mr. Hayes: Just a moment, that's going just a little too far. This man is an elevator operator, he doesn't know a thing about railroad costs. He is undertaking to bring to this record a self serving assertion on a matter concerning which he has neither general or specific knowledge and we move it be stricken.

Mr. Murphy: Mr. Examiner, Mr. Schier has qualified himself as having been in the transportation business for many many years and I think he is competent to express an opinion.

Exam. Dahan: We are merely accepting it as an opinion [fol. 341] of his. The commission will determine whether or not it is material.

Mr. Hayes: Mr. Examiner, as everyone within the sound of my voice knows this witness has not qualified himself to give an opinion and that is the basis of my motion and I renew it and I press it.

Exam. Dahan: We'll strike it then.

The Witness: Let me say I have been told by officers of the New York Central railroad that this rate would be compensatory.

Mr. Hayes: I object to what officers of the railroad told him as a self serving statement not subject to cross examination and maybe without particular knowledge of what they were talking about.

Exam. Dahan: I believe you should leave it to the New York Central railroad to make its own showing as to whether or not the rate is compensatory.

The Witness: One of my associates, Mr. Harron, will produce some exhibits to show car mile earnings on corn originating at West End Station and transmitted to Kankakee by the New York Central railroad, and I think he will produce other evidence to substantiate my contention that they are obviously producing compensatory revenues.

Mr. Legg: I ask that that be stricken. He has no right to characterize the testimony of others before it is intro-[fol. 342] duced.

Mr. Freeman: I will have to join in that motion.

Exam. Dahan: I'll let it stand. Go ahead.

Mr. Legg: I might ask that there be questions put to the witness. It is very hard for us to put an objection without our knowing what he is going to say.

Mr. Murphy: The question that was put to him is what he is answering.

Mr. Hayes: What was the question.

Mr. Murphy: State the position of the General Foods Co. and the reasons they take that position.

Exam. Dahan: Go ahead, Mr. Schier.

Mr. Murphy: I think this is a perfectly proper responsive answer.

The Witness: That's all I have. I think the time to quarrel with that, Mr. Hayes, is when you see the exhibits.

Mr. Hayes: Mr. Schier, you and I aren't going to quarrel about anything.

Exam. Dahan: Just a minute, Mr. Murphy, do you have any questions.

Mr. Murphy: I have no further questions.

Exam. Dahan: All right, Mr. Hayes.

Cross examination.

By Mr. Hayes:

Q. I was particularly interested and had the stenographer read back to me the insinuation that you put on [fol. 343] this record, sir, that the rates of the A. L. Mechling Barge line were what they are as a result of pressures imposed upon that line by certain of its large shippers. Do you remember throwing out that insinuation.

A. I remember that I said I wonder if.

Q. Did you by so saying intend to insinuate that that was the fact.

A. I simply wonder what caused this particular movement of grain to move for 18 years with practically no increase in the rate, and it is my transportation experience, sir, that this is quite peculiarly, this is singularly the only instance I know of in the world where that is true.

Q. Will you do me the favor, sir, to tell me what you think it is that I asked you.

A. Would you read the question please.

(Question read.)

Mr. Murphy: I submit that that was a responsive answer.

Mr. Hayes: You would think so. I don't and it obviously isn't.

By Mr. Hayes:

Q. I have asked you, sir, not for a speech but to answer this question, did you by making that statement concerning your wonder as to whether the rates of the Mechling Barge line were a response to pressures exerted by its large ship-[fol. 344] pers intend to insinuate that that was the fact. Did you or did you not.

A. Something of course has acted to retain a rate level for an unusually long period of years in face of the fact that each and every other mode of transportation that I am aware of has very substantially increased its rates. For example, the rates that we are currently paying to the railroads generally on products used by General Foods Corp. have been increased more than 100% since June 30,

1946. The ocean steamship rates that we are paying on our import green coffee from Brazil, cocoa from Africa, tapioca from Batavia, coconut from the Philippines has gone up substantially indeed. The barge rates that we pay on sugar from New Orleans to Evansville, Indiana have gone up substantially in that period. The barge rates we pay on green coffee from New York to Montreal have gone up substantially in that period. I know of no instance, sir, where we are able to buy transportation anywheres near the 1939 costs, and I repeat, I wonder why this is true on the Illinois and I just wonder. I am privileged to do that.

Q. Are you going to answer the question I asked you? I asked you if you meant to insinuate that the rates of the A. L. Mechling barge line—

Mr. Murphy: I object to the repetition of the question.

By Mr. Hayes:

Q. (continuing) were a response to pressures of its large [fol. 345] shippers.

A. I have given you the only answer I intend to give you, Mr. Hayes.

Mr. Murphy: Your Honor, I object to the repetitions.

Exam. Dahan: Have you given an answer to that question.

The Witness: Yes, I have indeed.

Exam. Dahan: If you don't like the answer, that's all we can do.

Mr. Hayes: We are entitled to an answer.

Exam. Dahan: I don't want to get into an argument between counsel and witness. That is his answer and you just can't get another answer by repeating the question.

Mr. Hayes: You can rule that he must answer my question responsively if you wish.

Exam. Dahan: Well, I can't rule to have anybody answer a question in a manner that will satisfy you. If that is the answer the witness wants to give, I can't make a ruling and say that counsel who propounded the question is not satisfied with the answer and he wants another answer. I can't make that kind of a ruling.

Mr. Hayes: All I want is a responsive answer.

Mr. Murphy: I submit that you have it.

Mr. Hayes: I have objected to the answer as not being responsive.

[fol. 346] Mr. Murphy: It has been ruled on.

Exam. Dahan: Do you have any other answer to that question.

The Witness: I have none. I thought it was most complete.

Mr. Hayes: What is the ruling to my objection.

Exam. Dahan: Your objection to what.

Mr. Hayes: My objection is that the answer given by the witness at great length says a great many things but did not answer the question I asked and I have a right to object to an answer which is not responsive to what I inquire of him.

Exam. Dahan: You want the answer stricken you mean.

Mr. Hayes: No, I want a responsive answer.

Exam. Dahan: You have the answer. If you want the answer stricken—

Mr. Hayes: Mr. Examiner, as you well know I don't want that answer stricken.

By Mr. Hayes:

Q. Your name, sir, is what.

A. Arthur C. Schier.

Q. I have been interested in your comments although they were not as I felt responsive that there is nowhere else in the world that you know of where you can buy water transportation or rail transportation for a price that was lower than it was in 1939.

[fol. 347] A. Correct.

Q. What was the rail rate by New York Central from Moronis, Illinois to Kankakee in 1939.

A. I don't know. I wasn't in any way associated with the business to have an awareness of it.

Q. What was the rate via New York Central from any of these Kankakee Belt stations to Kankakee, Illinois in 1939.

A. I don't know.

Q. I thought you knew all about these rates and were telling me at great and complete length in your answer to my previous questions. Don't you know as a matter of fact, sir, in view of your interest in this company at Kankakee and your long connection with it that the rates of that Kankakee Belt by rail to Kankakee were higher than 5½ cents in 1939.

Mr. Murphy: Your Honor, I submit they are higher now and Mr. Hayes is mis-stating the question. Are we talking about a re-shipping rate, proportional rate or what.

The Witness: Mr. Hayes, let's get down to earth. You are too smart to ask a question like that and I have greater respect for you—

Exam. Dahan: We'll take a recess.

Mr. Hayes: I have asked a question. Are you going to answer it or talk to me.

Exam. Dahan: Off the record, we'll take a recess.

[fol. 348] (Short recess.)

Exam. Dahan: Come to order please. I want to ask counsel for protestants in their examinations to confine their questions to statements of fact that have been made by the witness. I appreciate when the witness makes a statement that facts are interposed with arguments. Do not question on any argumentative matter but merely on statements of fact.

Mr. Hayes: Then there would be very little to cross examine this witness on, Mr. Examiner.

Mr. Freeman: I share the view that Mr. Hayes has just expressed and I have no questions of this witness.

Mr. Hayes: I have quite a few yet.

By Mr. Hayes:

Q. I might ask you first when this plant was built down there at Kankakee that you have been talking about.

A. In 1938, sir.

Q. When did you first become associated with that plant.

A. In 1935, with the company I became associated, of course, I mean.

Q. Well, again would you please answer what I asked you.

A. Your question was when did we put a plant at Kankakee and I answered 1938.

Q. My last question was when did you first become associated with that plant.

[fol. 349] A. When it was built.

Q. That's what I wanted to know. You referred to a natural territory, a natural buying territory. Do you consider the territory immediately to the west of Kankakee a natural buying territory for Indianapolis.

A. Our buyer does.

Q. You mentioned that there was a considerable period of time when you were associated with water transportation.

A. Yes sir.

Q. Was it your experience at that time that there was a differential between the rail and water rate?

A. Yes sir.

Q. About what did it run percentage wise.

A. It depends upon what trade route you are talking about.

Q. Well, could you make any statement about that, general or particular.

A. Oh, I think probably from 110%, perhaps 5% one way or the other.

Q. That is quite a spread, isn't it.

A. Just about this spread.

Q. Which would be the lower rate, the water or the rail rate.

A. The water rate.

Q. And did that sometimes have the effect of moving commodities by water that would have gone by rail if the [fol. 350] rates had been similar.

A. It did.

Q. You have heard the testimony here that since this 5½ cent rate went into effect elevator operators testified that they ship their corn to Chicago by rail. You heard that testimony.

A. I heard that.

Q. Do you regard it as a competitive situation when the grain goes to Chicago by rail and not a competitive situation when the grain goes to Chicago by water.

A. I am not aware of the fact that the barge lines, sir, have lost any volume since this rate was in effect. I think it

has been made crystal clear to the contrary that they have had more corn since it is in effect than they have ever had before.

Q. Is that the predicate of your testimony.

A. Yes.

Mr. Hayes: I have no further questions.

Mr. Murphy: For clarification, are you referring to barge corn to Chicago or rail corn to Chicago.

Mr. Hayes: I think the record is clear.

Mr. Murphy: I don't know whether it is clear, I don't know whether when you asked the witness about movements to Chicago whether you were talking about rail corn or barge corn. The record doesn't show there was a sub-
[fol. 351] stantial movement to Chicago through the Kankakee Belt, Mr. Hayes.

Mr. Hayes: I think the record is perfectly clear.

Exam. Dahan: You can read the record, Mr. Chartrand?

By Mr. Chartrand:

Q. Mr. Schier, I'd like to ask some questions that are factual in nature. However I understand Mr. Graves is going to testify with regard to buying at Kankakee.

A. He is.

Q. If any of these questions get into the area that could be answered by him, will you please advise me. First, does General Foods own any elevators on this Kankakee Belt line.

A. We do not.

Q. What percentage of your corn receipts at Kankakee plant is CCC government corn.

A. He'll have to answer that.

Q. Do you have the receipts of corn off of the line, for the past period of years.

A. He has that.

Q. What are your daily requirements of corn at Kankakee.

A. I don't know, he has that.

Q. Well, do you know whether or not the value of corn in that area is predominantly set or predicated upon an eastern demand.

[fol. 352] A. I think he is in a better position to give you the answer to that right now.

Q. Well, as a traffic man how were the rates made by the trunk line territory prior to the time the barge lines entered into the picture, rail rates.

A. Mr. Harron who is on my staff in charge of rates will have exhibits on that and once more is better qualified to testify on that.

Q. Is he going to testify.

A. Yes.

Q. Was it at your insistence that the New York Central docketed the application that ultimately resulted in this 5½ cent rate.

A. There was no insistence, Mr. Chartrand, on anyone's part. It was a cooperative venture developed to accomplish just exactly what it has accomplished, the competitive equality of purchase opportunity for General Foods and some worthwhile tonnage for the New York Central railroad.

Q. At the time the public hearing was held on that subject did you appear and make a statement.

A. I did.

Q. Did you make a statement to the effect there to the carriers considering the matter that if it should develop that there was a destructive competitive picture that re-
[fol. 353] sulted from the establishment of this low 5½ cent rate, that you were willing to have it changed if that developed as a fact.

A. Mr. Chartrand, this hearing as you are aware was held in mid '56 some time. Now the answer to your question is yes, I did make that statement and now from memory I am going to give to you the text of it as best my memory will serve me. When I made the statement I asked that the secretary record it as a matter of fact and you are at liberty to check that statement against my memory and I'll buy the statement as it is recorded. I said that if for example the elevator operators on the West End Division of the Kankakee Belt in their exuberance to get more and more corn attracted to their elevator expanded their area of operation so that it invaded the parallel railroad elevator, wait a minute, so that if they extended their purchase

operations to an extent that adversely affected rail car loading, not truck corn to the river, but rail car loadings of free corn and that were brought to our attention, we would cut back the purchases of our corn in that area, a policy of course way beyond anything a river elevator would have dreamed of doing.

Q. Do you still stand by that position today.

A. I said it then and I repeat it now.

Q. Of course that wouldn't have any binding effect or [fol. 354] morale obligation upon purchases at Indianapolis or at Paris or Danville.

A. I spoke for our company.

Q. For your company. If it should develop upon this record that that actually did happen, what would you be willing to do.

A. You must recall, Mr. Chartrand, that I said if a railroad executive of one of those parallel lines brought this to my attention and said it was indeed bringing a great harm to them, and by harm to them I mean minimizing their free corn movement by rail, if he would take it up with me we would then take an action. So far no railroad man has even indicated to me that such a harm has come to them.

Q. But if it develops on this record?

A. Then let's take it up when it develops and see what the circumstances are and understand them completely and we'll cross that bridge when we get to it. It is generally accepted when we make statements on the record we stand by them.

Q. Then when it is developed on this record if called upon will you then make a statement as to your position.

A. Yes.

Mr. Chartrand: That's all.

Exam. Dahan: Any redirect.

[fol. 355] Mr. Murphy: Yes, just one question. Mr. Hayes questioned you about a movement of corn to Chicago. Do you understand that a substantial volume of corn moved from the Kankakee Belt line west end station to Chicago.

The Witness: Free corn.

Mr. Murphy: That's right.

The Witness: I do not.
Mr. Murphy: That's all.
Exam. Dahan: The witness is excused.

(Witness excused)

Exam. Dahan: Do you have a short witness.
Mr. Murphy: Not a short one at this time. Yes, we have one short one.

R. J. GEEKIE was sworn and testified as follows:

Direct examination.

By Mr. Leiper:

Q. Please state your name.
A. R. J. Geekie, Traffic Manager for the Illinois Cereal Mills, Paris, Illinois.
Q. Can you describe for us briefly your company and the business it conducts.
A. It is a dry corn mill and our products are corn meal, corn flour, corn grits and hominy feed.
Q. Could you tell us then what the bushel capacity of your elevator at Paris is.
[fol. 356] A. It is about 225,000.
Q. Are you generally familiar with the sources from which your company purchases corn, that is with respect to your duties as traffic manager.
A. Yes.
Q. Prior to December 15, 1956 was your company desirous of purchasing rail corn from origins on the New York Central west of Kankakee.
A. Yes, we tried to buy as much there as possible, our grain department did.
Q. Were the rail rates prior to December 15, 1956 such that your company was able to buy corn.
A. No, our grain department claimed all the corn went to the low barge rate to Chicago. Of course there was no corn offered to us.
Q. In the period 1954 through 1956 were you able to make any purchases in that area.

A. It seems like we got two cars in during that period.

Q. During the first 8 months of 1957 while the 5½ cent proportional rate on corn was in effect, did your company purchase corn in rail cars.

A. Yes, our brokers, we got 327 cars.

Q. And was the 5½ cent rate eventually applied to that car, that method of transit.

A. Yes.

[fol. 357] Mr. Leiper: That's all.

Cross examination.

By Mr. Hayes:

Q. Did you say Paris, Illinois.

A. Yes sir.

Q. And your business is that of a milling company.

A. Corn mill, yes.

Q. Where did you get your corn before December 15, 1956.

A. We buy all Illinois grain, all over Illinois and local in adjoining counties and in Chicago and St. Louis.

Q. Do you get an adequate supply.

A. Yes, it gets a little tight at times.

Q. And does that meet your requirements.

A. Yes.

Mr. Hayes: That's all.

By Mr. Legg:

Q. How far is Paris from Kankakee.

A. I'd say it is 117 miles.

Q. Do you buy corn only from Illinois, St. Louis and Chicago markets.

A. That's about all, and local Illinois corn.

Q. And local Illinois corn. You do not buy corn from any of the Indiana markets.

A. No.

Q. How far is it from Paris to the nearest Indiana market.

A. Oh, I don't know, I guess Indianapolis would be the [fol. 358] nearest market, that's a hundred miles.

Q. Why do you prefer Kankakee to Indianapolis.

A. Our traffic moves east.

Q. It is because the proportional rate allows you to reship if the corn comes from Kankakee and it would not—

A. It would be a back haul if we brought corn in from Indiana and attempted to ship east.

Q. The mill product would not be eligible for the proportional rate if you obtained your corn from Indianapolis.

A. No, you wouldn't have any proportional or through rates via Paris.

Q. Did you say how much corn you mill in the course of a year? If you did, I didn't hear it.

A. I didn't say anything about that.

Q. How much is it.

A. I can tell you by the day.

Q. How much would it be by the day.

A. It would average between 20 and 30 thousand bushels a day, so it would be up and down.

Mr. Chartrand: That would be between 10 and 15 cars roughly.

The Witness: Just roughly.

By Mr. Legg:

Q. That's an average over the whole year.

A. Yes.

Q. How constant is that.

[fol. 359] A. Last year it was constant.

Q. And is it 5 days a week or 7 days.

A. Well, it would average 6 days a week.

Q. Has your corn consumption been fairly constant over the period of the last few years.

A. I would say yes.

Q. When you began to buy corn from the Kankakee Belt, did you curtail your purchases from some other source.

A. We probably bought less from Chicago and less from the western part of Illinois.

Q. Do you know to what extent.

A. No, I couldn't tell you.

Q. What approximately is the price advantage of Kankakee corn over Chicago corn.

A. I couldn't tell you that.

Q. Why do you buy the Kankakee corn instead of the Chicago corn.

A. I don't buy it, our grain department buys it.

Q. Oh, I see. You do know that there is a price advantage on the Kankakee corn?

Mr. Murphy: I object. He testified they didn't buy corn there prior to the time the rate was in effect and that they did after the rate was in effect.

Mr. Legg: There must be a reason, Mr. Murphy, and I would like to find out what the reason is.

[fol. 360] The Witness: It is a country run corn we call it in milling. Corn at Chicago is termed elevator mix I think. That is, our millers term it that way.

By Mr. Legg:

Q. Do you know whether there is any price advantage of the Kankakee corn over the Chicago corn.

A. No, I wouldn't be able to tell you.

Q. What is the advantage of country run corn over elevator mix corn.

A. It mills better.

Mr. Legg: I have no further questions of the witness.

By Mr. Freeman:

Q. I have a few questions. I understand you bought less corn from the west of you after this rate went into effect.

A. Probably less of the connecting lines to the New York Central west of us.

Q. You are served by the New York Central, that's their line to St. Louis.

A. To St. Louis and from Chicago to Cairo. We are served by both lines.

Q. And New York Central goes east from Paris.

A. East from Paris and west.

Q. Do you ship throughout the east or do you have a rather local distribution.

A. No, we ship throughout the east, the south, Canada and the West.

[fol. 361] Q. Does your product go out entirely by rail.

A. No, some goes by truck, a small percentage.

Q. A small percentage by truck.

A. Yes.

Q. You mill all the corn that is brought in there and you send the product out as a milled product.

A. That's right.

Q. What does that load approximately.

A. It loads to a 100,000.

Q. Your product.

A. Yes.

Q. Is that in bulk.

A. In bulk and in bags.

Q. Did you say 200,000.

A. No, 100,000.

Q. What is the range, from what to what.

A. The minimum is 40,000 pound shipments and we have a lot of 100,000 pound shipments.

Q. It averages from 40 thousand to 100 thousand.

A. That's right, the average is around 80 I would say.

Q. Do you compete with other mills located not only in the middle west but the east in your shipments to the east.

A. We compete with mills in the mid-west.

Q. In so far as you ship, maybe I misunderstood, do you [fol. 362] ship your product all the way to the eastern seaboard.

A. Yes.

Q. And for that market do you also compete with mills in the east.

A. Well, there are very few mills in the east. We sell there so we must compete there.

Q. Are there any mills in Buffalo.

A. I don't know as there's any corn grown in Buffalo.

Q. Is your product used almost exclusively as feed or is it for human consumption.

A. It is for human consumption and for feed.

Q. How would that break approximately.

A. About a third for feed.

Q. Does your product go to ultimate destination or does it receive some sub-transit—

Mr. Leiper: Mr. Examiner,—never mind.

By Mr. Freeman:

Q. Does it receive some transit between Paris and its ultimate destination.

A. It may, some receive some transit at Buffalo because it is billed there for mixing, that would be the feed.

Q. And the grain for human consumption.

A. I doubt that. I don't know whether that, I think we sell to the consumer right there.

Mr. Freeman: That's all I have.

By Mr. Chartrand:

Q. Mr. Geekie, did you say that you received two cars [fol. 363] off this line in 1956.

A. No, it was prior to that.

Q. Prior to that.

A. But I couldn't tell you when. I think it was just 2.

Q. And 327 cars in 1957.

A. That's right.

Q. How did those cars in 1957 route into Paris.

A. They route to Kankakee then NYCW to Danville then NYC.

Q. Did any come down IC.

A. No.

Q. Then you process the corn there.

A. Yes.

Q. What is your major product that you make out of this corn.

A. Well, there wouldn't be any major product. We grind grits, corn meal, corn flour and the offal is grit.

Q. What are grits made of.

A. I couldn't tell you.

Q. Do you ship from Paris to Cleveland for example.

A. Yes.

Q. Do you have transits at Paris on the proportional rate from Kankakee to Cleveland.

A. No.

Q. What would you pay.

[fol. 364] A. Well, we wouldn't use that billing, we would use billing off the IC or Wabash.

Q. Where can you go with this billing? Do you go to Pittsburgh?

A. No, we go to Buffalo, and beyond on the New York Central.

Q. So that would be from Kankakee through Paris, thence to Buffalo.

A. Then beyond on connecting lines or direct New York Central.

Q. Let's say to New York City.

A. Either New York Central or the Erie or the Lehigh Valley.

Q. Are you subject to a penalty at Paris under the Three-Way-Rule.

A. No.

Q. It is waived on the New York Central.

A. It is waived on the New York Central.

Q. Are you subject to a penalty to any of the destinations where this tonnage will work.

A. No.

Mr. Chartrand: That's all, thanks.

Mr. Erickson: No questions.

Exam. Dahan: Any redirect.

Mr. Leiper: No.

[fol. 365] Exam. Dahan: You are excused. We'll recess until 9:30 tomorrow morning.

(Witness excused)

(Whereupon at 4:50 p. m. the hearing was recessed until 9:30 a. m. Friday, January 31, 1958.)

[fol. 368] PROCEEDINGS OF JANUARY 31, 1958

Exam. Dahan: I just want to announce that the hearing, if continued until Monday will be held in Room 4, Board of Trade Building.

Come to order please. Are you ready to proceed?

Mr. Murphy: Yes, Your Honor. I'd like to call Mr. Graves.

LAWRENCE E. GRAVES was sworn and testified as follows:

Direct examination.

By Mr. Murphy:

Q. Will you please state your name and business address?

A. Lawrence E. Graves, Manager—Purchasing, General Foods Corporation, Kankakee, Illinois.

Q. How long have you been employed by General Foods Corporation?

A. Thirty years.

Q. In your capacity are you responsible for the purchasing of corn for your operation at Kankakee?

A. Yes, I am, and have been for the past nineteen years.

Q. Describe some of the functions incident to the purchasing of corn.

A. Corn is bought in a highly competitive market on low margins; therefore, in the performance of my functions, it is necessary for me to be aware of competitive markets, [fol. 369] competitive transportation costs, sources of supply and demand, both of my company and of other buyers. It is also necessary for me to be informed as to bids to the country placed by other buyers.

Q. Do you consider the area served by The New York Central west of Kankakee as a natural source of supply of corn in the Kankakee mill?

A. Yes, we do, and that was one of the reasons why the mill was located at Kankakee.

Q. In recent years, have you been able to buy any substantial amount of corn from elevators along the New York Central for rail delivery to your Kankakee plant?

A. Not until December of 1956, at which time The New York Central established a rate that permitted us to enter that market again.

Q. Have you bought corn from this area continuously since December of 1956?

A. Yes, except that we were forced to go out of that market in September 1957, after the five and a half cent rate was enjoined. However, we are now back in the market. We reentered the market in November 1957, before the injunction was vacated as we were confident that the injunction would be lifted.

Q. Were your expectations realized, Mr. Graves?

A. They were.

[fol. 370] Q. Describe the handling of corn from the time it leaves the farm where it is grown until the time it is placed in your elevator at Kankakee when moved by rail.

A. The corn is shelled on the farm, hauled via truck to the country elevators, elevated into boxcars, moved by rail to Kankakee and then is elevated into our elevator.

Q. Describe the handling of corn when moved via the barge route to Chicago.

A. The corn is hauled to the barge elevator via truck, elevated into barges, moved via the Illinois Waterway to Chicago and elevated into a terminal elevator.

Q. Who bears the transportation cost of trucking from farm to country elevator?

A. The farmer bears the trucking or transportation cost from farm to the rail elevator, or the river elevator.

Q. How would the truck costs borne by the farmer on deliveries to country elevators compare with his truck costs on deliveries to river elevators?

A. The truck costs vary by the mileage, the greater the distance, the greater the cost. At a midway point between the Illinois River and The New York Central, truck costs would equalize. From a point nearer the river than the elevators on The New York Central, the truck costs to the river would be less than the truck cost to the country elevator and, of course, the converse would be true from [fol. 371] farms nearer the country elevator than the river elevators.

Q. When you buy corn from country elevators on the New York Central for rail shipment to Kankakee, on what basis is it purchased?

A. We purchase it f.o.b. rail car at the country elevator station.

Q. What services are generally performed by the country elevator operator before he makes this delivery?

A. Country elevator operators normally receive truck corn, weigh, grade, elevate it into storage bins, after which it is re-elevated to box cars.

Q. How does this compare with the purchase of corn by competing Illinois River elevator operators?

A. The operation is identical. Here, too, corn is received by truck, weighed, graded, and elevated into storage bins, after which it is elevated into barges.

Q. The rail elevator operator transfers the corn from his storage bins into a box car. Is there any trimming involved in this operation?

Mr. Legg: Objection, the witness hasn't been qualified, he has shown no knowledge of country elevator operation.

By Mr. Murphy:

Q. Mr. Graves, how long have you been down at Kankakee with General Foods?

A. Twenty years.

[fol. 372] Q. Do you travel to the country elevator stations?

A. Yes.

Q. Do you know the elevator operators along the New York Central?

A. Yes.

Q. Have you been to the elevators?

A. Yes.

Q. Have you observed their operation?

A. Yes.

Q. Have you ever merchandised corn yourself?

A. Yes.

Mr. Murphy: I submit, Your Honor, with those qualifications the witness is competent to answer that question.

Mr. Legg: Go ahead and ask it.

Mr. Murphy: I have asked it.

Exam. Dahan: Will you answer the question.

By Mr. Murphy:

Q. I asked you about the trimming operation on rail loads at country elevator station.

A. Yes, it is performed at the country elevator station.

Q. By whom?

A. By a man in the employ of the country elevator or the operator.

Q. What kind of an operation is it?

A. It is merely a leveling off of the corn in the car.

Q. Is there a trim operation when corn is transferred [fol. 373] from a river elevator into barges?

A. Yes. There is a similar trim operation performed. In both cases the cost is assumed by the elevator and is, of course, included in his selling price.

Q. When you said in both cases you meant both by river elevator operator and rail elevator operator?

A. Yes, that's right.

Mr. Hayes: I don't think the witness is qualified to answer that question and I ask that the answer be stricken.

Exam. Dahan: I will permit it to stand. If the answer is not correct, you can so show.

Mr. Murphy: Do you take the position that there is no trimming on barge movements?

Mr. Hayes: I take the position that the witness is not qualified to answer the question and that the answer he has made is incorrect. I do not take the position that there is no trimming on barge movements.

Mr. Murphy: I don't see how the answer is incorrect.

By Mr. Murphy:

Q. What is the difference between rail elevator operation and river elevator operation?

A. There is no physical difference between rail and river elevator operations. The only difference, then, lies in elevator ownership. Rail elevators on the New York Central line west of Kankakee are owned by individuals living in [fol. 374] each city. River elevators are operated and controlled by large Chicago grain merchants who also have elevator facilities in Chicago where they receive these barge shipments.

Q. Would corn after elevation into barges at the river be comparable in market value with corn in rail cars at the country stations?

A. Yes, assuming that the barge rates and the rail rates were the same.

Q. Did the effectiveness of the five and a half cent rail rate cause you to make any shift in your source of corn?

A. Yes, as I have already indicated, for the first time in a good many years, we were able to buy corn in the area west of Kankakee. We were able to buy an increased portion of our corn requirements in the country markets. Prior to December 15, 1956 the Illinois River elevators controlled the market along the Illinois River and Kankakee Belt.

Q. How did this affect the competitive situation in this country market?

A. Before December 15, 1956 the river elevators had no competition, but since that date the farmer has had a healthier situation in that he has had two markets for his corn; barge and rail. With the five and a half cent rate, competition between the rail and barge buyers was estab- [fol. 375] lished. In my opinion this resulted in higher bids from barge buyers and rail buyers than would have been made if only barge buyers had been in the market.

Q. Have you prepared an exhibit that shows the purchase price of corn on the Illinois Proportional rate and the bids that can be made by barge bidders and rail bidders?

A. Yes.

Mr. Murphy: Your Honor, may we have this next exhibit which is a statement showing purchase basis of corn marked for identification?

Exam. Dahan: It may be marked for identification Exhibit No. 25.

(Applicant's Exhibit No. 25, Witness Graves, was marked for identification.)

By Mr. Murphy:

Q. Will you please explain your exhibit No. 25?

A. The Chicago price less transportation cost to Chicago set the bids to the country for corn. The normal transporta-

tion cost used for rail bids is the Illinois Proportional. My exhibit, based on a $1.15 Chicago price, shows that the rail bid on the Illinois Proportional basis would reflect a price of 100.68 cents per bushel to the farmer.

Q. Right there, Mr. Graves, where is the $100.68 per bushel shown on your Exhibit 25?

A. Well, let's see, that would be the end of the third [fol. 376] paragraph under examples.

Q. All right, will you proceed please.

A. Prior to the establishment of the five and a half cent proportional rate the river buyers controlled the country market as they could bid whatever was necessary over rail bids and obtain the corn for delivery by barge to Chicago. The establishment of the five and a half cent proportional rate now permits one to bid in competition with the river buyers although there is still a difference in their favor.

Q. Do you show on that exhibit the amount the river elevator operators could bid?

A. Yes, I do.

Q. What was that amount?

A. A dollar nine and ninety-six hundreds cents per bushel.

Q. Where is that?

A. That's well, I'd call it the end of the fifth paragraph.

Q. And do you show what the difference in favor of the barge bidders was under that basis?

A. That's right, nine and twenty-eight hundreds cents per bushel.

Q. And where do you show what the rail bidders can offer now?

A. Based on the five and a half cent rate you just follow right on down and about the end of the eighth paragraph [fol. 377] a dollar nine and thirty-three hundreds cents per bushel.

Q. In your opinion, Mr. Graves, would a rate higher than the five and a half cent rate which was published by the New York Central during the eight month period after December 15, 1956 be competitive with the barge rate on shipments destined to Official Territory?

A. No, for if the rail rate were higher than five and a half cents the barge buyers would have a competitive purchase advantage and would control the market. That would force the grain to the river elevators. As shown in my ex-

hibits, the barge buyers now have a purchase advantage, and any increase in that advantage would be sufficient to eliminate the competition of rail buyers. It is important to realize that grain is traded on a very narrow margin.

Mr. Murphy: Thank you, Mr. Graves; the witness is available for cross examination.

Cross examination.

By Mr. Bradford:

Q. Mr. Graves, this difference of point 63 cents per bushel represents five eighths of a cent a bushel?

A. That's approximate.

Q. So the barge line still has that advantage?

A. They still have that advantage, that's right.

Mr. Bradford: Thank you.

By Mr. Hayes:

Q. Your Exhibit No. 25, Mr. Graves, referring to the [fol. 378] fourth paragraph under examples shows a price to farmer at river elevators a hundred nine, ninety-six hundreds cents per bushel. Do you see that figure?

A. I do.

Q. I want to talk about that in a few moments. Then coming down four paragraphs under that you have an item price to farmer at country elevator a hundred nine, thirty-three hundreds cents per bushel. Do you see that figure?

A. Yes, sir.

Q. And then the difference between those two is sixty-three one hundreds of a cent. Is that what you have there?

A. Yes, sir.

Q. Is it the intention of that exhibit to show that there would be sixty-three one hundreds of a cent difference in favor of the river bid to the farmer under the present rate adjustment?

A. That shows that the price to the farmer made through the channels made by river elevators could exceed the best price made by rail elevators through channels to the farmers by that amount.

Q. I am not sure that I got your answer to my question. Perhaps you didn't understand it.

A. I think I understood it.

Q. Then I don't understand your answer. I asked if the purpose of that comparison was to show that under the [fol. 379] present rate adjustment there would be a sixty-three hundreds of a cent higher price to the farmer for his grain if he sold it at the river.

A. No, it doesn't show that; the advantage is there.

Q. That's the intention to show that it could be like that?

A. That's right, based on the factors shown here.

Q. Is it like that?

A. Well, these factors are correct so why isn't it like that?

Q. That isn't what I asked you. I asked you if it is like what your exhibit purports to show?

A. Yes, the river has that much edge over the rail buyer.

Q. Well, on the bids for grain between the river and the rail, is that what you mean to say?

A. On corn they have that edge in buying, yes.

Q. Well, that difference that you observed between the river bid and the rail bid.

A. I don't quite understand your question. Are you asking me to tell you what the river bid is?

Q. I am asking you if this is representative, this difference here, of the difference between the river bid and the rail bid as you have observed it?

A. That's asking me to testify what the river bid is and I frankly don't know what the river bid is today.

Q. Well, you may not know what it is today, but as a grain buyer certainly you have some familiarity with it.

[fol. 380] A. Yes, I do, but as of this morning I don't know what the river bid is, but the advantage is there based on these factors.

Q. That's not what I'm asking you this morning. I am asking if this difference in figures that you have figured out here is representative of what actually occurred as you have observed it while this present rate adjustment has been in effect?

A. Again I tell you you are asking me to testify what the river bid is, otherwise I can't answer your question.

Q. Have you as grain buyer kept track of what the river bid is?

A. Definitely.

Q. While this present rate adjustment was in effect?

A. Yes, sir.

Q. And the rail rate?

A. Yes, sir.

Q. Now, since you have kept track of it and have that knowledge of it, I am asking you, if you are willing to do so, tell me whether this result that you have figured out of sixty-three cents per bushel is representative of what actually occurred as to that difference under the present rate adjustment as you observed it?

A. The advantage is there and can be used at any time they see fit to use it.

[fol. 381] Q. I understand that is your opinion, sir. I haven't asked you that. I asked you a different question. Will you please answer?

A. If you want my opinion I would say yes.

Q. I didn't ask for your opinion, I asked for your observation.

A. Yes, I will say yes, it is used.

Q. Oh, it is used. I ask you again to tell me if that difference of sixty-three cents is fairly representative of the differential between the rail and river bid as you have observed it under this present rate adjustment? Is it or isn't it?

A. I can't answer your question worded in that way.

Q. Well, then perhaps we'll have to supply witnesses who can answer it, but I am going to ask you one more question along that line, sir. You know very well, don't you, on the basis of your experience that that sixty-three hundreds of a cent is not representative of the actual differential between the rail and river bid under this existing rate adjustment?

A. No, I don't know that.

Q. I think you said that grain in barge—strike that. I think you said that grain, corn after elevation into barges at the river was comparable in market value with corn in rail cars at the country stations. As a buyer of corn, [fol. 382] would it be necessary to fix a price for mixed barge grain that reflected the cost of elevation at Chicago?

A. You didn't quote me completely in your opening statement that I said that one was—

Q. On page four of your testimony, it is a question and you may read it or I'll read it. Would corn after elevation into barges at the river be comparable in market value with corn in rail cars at the country stations, and your answer was yes.

A. That's what I wanted to bring in, the fact that the rates have to be equal.

Q. Now, I asked you this question, I'd like to have an answer to this if I can get an answer to this one. I have not—

A. You can try.

Q. I haven't had much luck, have I. The question is would a buyer of X barge corn have to pay a price that reflected the cost of the elevation of that corn, its transfer into rail cars at Chicago?

A. Well, that is a controlled movement. Now if—well, leave the if's out. I don't know if it is offered at that level.

Q. Could it be so far as your knowledge?

A. I am speaking of the level after it is loaded into the [fol. 383] barges. I don't know know of any reason why it couldn't be offered at that level.

Q. What level are you speaking of now?

A. After being loaded into barges, same as being loaded into boxcars.

Q. Did you ever hear of it being offered at that level?

A. Yes, I have.

Q. Where, when and by whom?

A. I can't name names right now, but I have heard of cases where different elevators bought grain from other barge operated elevators for movement into Chicago.

Q. Would those be Chicago marketing elevators?

A. Yes.

Q. Now, if a consumer of grain is going to buy X barge grain or if a Chicago marketing elevator is going to buy X barge grain, he has got to consider determining what he can sell it for, the cost of elevating that grain at Chicago, hasn't he?

A. I don't know who you mean by consumer.

Q. Well, let's put it this way, grain that moves by barge has to pay in the end, stand in the way of transportation cost. I am referring now to corn, the cost of an elevation in country as you put it here first, is that right?

A. (Nodded) Finish your question.

Q. That's the first part.

[fol. 384] A. Will you repeat it so I can get the first part? It was quite long and involved.

(Question read.)

A. That question is confusing to me. Will you please see if you can clarify it? You confused country and barge there. To me country is one thing and barge is another thing.

Q. We can agree on that, Mr. Witness, but this grain is going to go to Chicago by barge plus wanting to get there, right?

A. Yes.

Q. The first element of expense is the elevation in the country before you get to the river, right?

A. No.

Mr. Murphy: On barge corn?

Mr. Hayes: You have an item here of the country elevator mark up. It has an expense for country elevator mark up, doesn't it?

Mr. Murphy: I am asking you, are you referring to elevation of barge corn, Mr. Hayes? I'd like to have the question clarified because I think it is contrary to what's in the record.

Mr. Hayes: Mr. Examiner, I have made it so plain that here was corn going to go to Chicago by barge. I think the witness understands me and I think Mr. Murphy under-

[fol. 385] stands me and I wish they'd answer the questions I ask.

The Witness: I'm sorry, the witness does not understand the question.

By Mr. Hayes:

Q. You understand the corn is going to go to Chicago by barge has to pay transportation cost to get there. The first element of that transportation cost shown here on your exhibit is the cost of country elevator mark up, right?

A. No, that's not transportation cost.

Q. But it is an element of expense, isn't it?

A. It's an element of expense in this sense, that it is what the country elevator man takes as his commission.

Q. Well, I don't think the Supreme Court agrees with you that elevation is not a part of transportation cost, but—

A. Wait a minute, I didn't say it was elevation.

Q. But the corn is going to go to Chicago by barge. That's true, isn't it?

A. I didn't hear that. You'll have to repeat it.

Q. It is true, is it not, that the country elevator cost is an expense, a charge is an item of the expense of getting corn from the country in this area to Chicago?

Mr. Murphy: I object to that question, because there's nothing in the record that shows the corn is elevated at a country elevator before it moves to the barge.

Mr. Hayes: I have asked the witness a question.

[fol. 386] Mr. Murphy: I object because it is contrary to the facts.

Mr. Hayes: Counsel's statement of what the record has been is irrelevant. What the record will be depends on the witness' answer to this question.

Mr. Murphy: May I make my objection without interruption?

Mr. Hayes: Yes, which is more than— Go on.

Mr. Murphy: Are you through, sir? I object to it on the ground that the questions assume a fact contrary to that shown by the record. There is nothing in the record that shows that the corn is elevated through a country elevator prior to the time it goes to the river. The record shows the contrary to be true.

Exam. Dahan: If you intend to develop that, do it through your own witnesses by direct testimony. Or do you intend to do so?

Mr. Hayes: I certainly intend to do so, sir. If his witness would answer the simple questions asked, I could prove it by him, but if he isn't going to answer the questions I can't do it.

Exam. Dahan: I'll sustain the objection. You can put it in through your direct evidence and if applicant doesn't like it he can rebut it.

Mr. Hayes: I think I am going to have to follow that method, Mr. Examiner, simply because this witness won't [fol. 387] answer plain questions. I'll ask no further questions of him for that reason.

By Mr. Legg:

Q. Mr. Graves, who instructed you to re-enter the corn market in the Kankakee belt area in November 1947?

A. Me.

Q. Only you?

A. Yes.

Q. Did you do that on advice of counsel?

A. Counsel?

Q. There was an injunction in effect there, you seemed to be confident that it would be lifted.

A. There's no law that stops me from buying corn if I want to.

Q. Were your bids made on the basis of the five and a half cent rate or on the basis of some other rate?

A. No, they were made on the basis of the five and a half cent rate.

Q. And you regarded that as a prudent business risk?

A. I called it a calculated risk.

Q. You had no other advice than your own information?

A. No, I had other advice.

Q. Was it advice of counsel?

A. No.

Q. From whom did you get the advice?

[fol. 388] Exam. Dahan: Mr. Legg, I am just wondering how pertinent all this examination is going to be.

Mr. Legg: I don't know, Mr. Examiner. It's very interesting. Whether it is pertinent or not, I don't know. I'll forego any further questions along that line.

By Mr. Legg:

Q. Does your statement on page four to which Mr. Hayes previously referred assume that the destination of the corn on the barge and corn on the rail is the same ultimately?

A. What question of Mr. Hayes are you referring to?

Q. It is the third question and answer on page four.

A. There is no statement there as to ultimate destination at all, that is merely the statement of the value at that point.

Q. I know. Do you assume that the value is estimated on the basis that the destination for each or for the corn on the barge and the corn on the rail will be the same?

A. No, I can't make that assumption. I merely stated that at that point their value was equal. I don't know what the ultimate destination would be.

Q. If the barge part was destined to Chicago and the rail part also was destined to Chicago ultimately, would the rate be the same on the barge and on the rail?

A. I think that would still be true if the rates were the same.

[fol. 389] Exam. Dahan: What you are trying to say is that if the rail rate and barge rate were the same, the market value of the corn at Chicago would be the same?

The Witness: That's right.

By Mr. Legg:

Q. The market value at Chicago would be the same but if they were going to different markets then the prices might not necessarily be the same, would they?

A. We were talking about values, not necessarily prices.

Q. Doesn't value depend on the demand for the product, and doesn't the demand depend on the place where you are going to take it ultimately?

A. Will you restate his question there?

(Question read.)

A. I think that there needs to be more in that question, because you are assuming demand is what controls the value.

Q. I'll ask you that, does demand control the value?

A. Not entirely.

Q. Assuming supply is the same as you have here, does it not?

A. If your supply is equal you mean?

Q. Yes, sir, as you have assumed here, then does not demand determine the value of the products?

A. It seems to me it would be the same.

Q. That's not what I asked you, Mr. Graves. I asked you would not demand determine the value of the product?

[fol. 390] A. Okay, yes. I'll say yes, it would. I am not at all sure but just for your sake I'll say yes.

Q. Would not the demand for the product depend on the destination to which the product was to be taken? Would there not be a greater demand in one place for corn than there would be in another?

A. There could be, yes.

Mr. Legg: All right, I have no further questions of the witness.

By Mr. Freeman:

Q. For the purpose of clarification, Mr. Graves, the price you show in Exhibit 25, Chicago market, are you talking about spot price?

A. No.

Q. What price are you talking about?

A. That is based on the fact that rail corn with billing, barge corn with billing of the same deliverable value on futures contract or on contract at Chicago, graded corn that is.

Q. Do you buy, pay the same price for X barge as you pay for X rail corn in Chicago?

A. I have.

Q. Do you prefer one over the other?

A. Some rail billing if it is available will give you more flexibility on an outbound movement.

Q. Do you prefer X rail billing then?

[fol. 391] A. I said some X rail billing.

Q. I asked you if you prefer X rail billing.

A. You are limiting me; to some destinations it makes no difference.

Q. How would your 1956 X rail versus X barge shipments out of Chicago compare?

A. I can't tell you.

Q. You don't know?

A. I don't know sitting here. I could tell you from the records at the office.

Q. Will your next witness have this information?

Mr. Murphy: I don't think he has it.

By Mr. Freeman:

Q. Going down to your last set of assumptions on Exhibit 25—

Mr. Leiper: I think that remark should be stricken.

Exam. Dahan: You said assumptions. Proceed.

Mr. Murphy: What was the question?

Mr. Freeman: I haven't asked it yet. Well, you threw me off base if nothing else.

By Mr. Freeman:

Q. You show a rail rate there of three seventeen a bushel.

A. Yes.

Q. That's your rail rate to Kankakee?

A. Right. No, that's the proportional.

Q. The rate to Kankakee for reshipment beyond?

[fol. 392] A. Yes.

Q. That rate will get grain into the General Foods facility at Kankakee?

A. That is not the inbound rate to Kankakee if you are talking about the rail operation.

Q. When you use that, the billing from the Kankakee belt going east, and when you process that grain as I take it you do in your Kankakee plant, it is three point seventeen cents that gets the grain in your facility at Kankakee, is it not?

A. On the through movement, yes. Qualification there, you said gets it into our facility. It doesn't get it into our facility it gets it to our facility.

Q. In Kankakee?

A. Yes.
Q. You have unloading facilities at Kankakee?
A. Yes.
Q. You unload into an elevator?
A. Yes.
Q. Which is part of your processing plant?
A. Adjoining the processing plant.
Q. Adjoined to?
A. Adjoining to.
Q. You load out at that same plant?
A. Now are you talking about the elevator facility or th
[fol. 393] plant?
Q. I am talking about the plant. Do you load out at tha
same plant physically located in the same place as the ele
vator and the processing plant?
A. Yes, we load cars at the plant.
Q. You unload cars from one side of your plant and loa
them from the other side?
A. No, the cars are unloaded into an elevator.
Q. And where are they loaded?
A. The products?
Q. Yes.
A. They are loaded from the plant not from the elevator
Q. Well, will you describe these facilities to us, you
elevator and processing plant? Are they physically con
nected?
A. As I said they are adjoining, one is alongside th
other.
Q. Do you have to use a rail car to get from your elevato
to your processing plant?
A. No.
Q. Do you have some sort of a conveyor method to ge
from one to the other?
A. That's right.
Q. And they are physically connected in that sense?
A. That's right.
[fol. 394] Q. Do you know who the river bids are made to
Are they made to the farmer or are they made to a country
elevator?
A. Well, now that is from my observation and what i
reported to me.

Q. I want to know one, first I want to know what the basis of your knowledge is generally, and when you have actual knowledge then you tell me on the basis of your knowledge. If you don't know the answer to any one of these questions I want you to say so.

A. If you want to know who the river elevator operators put the bids out to, yes, I do know they put them out to country elevators. When you say to my knowledge, are you asking—

Q. It is the country elevator operator who in turn makes the bid to the farmer?

A. Yes, sir.

Q. The country elevator is buying the grain, is it not?

A. Yes, sir.

Q. And the country elevator is selling the grain to some one located on the river?

A. You keep saying grain, do you want to say grain, or do you want to say corn?

Q. Corn, we are talking about corn. When you get to the river, you say in that connection all of the houses along the river have elevator facilities in Chicago. Is that your [fol. 395] understanding?

A. I don't know of any exceptions to that. Wait a minute. there is one further down on the river, yes, that's true.

Q. So you'd have to modify your statement you made in your testimony that you know of none who do not?

A. I do not know of Dewey having a house at Chicago, no, that's correct.

Q. And you wish to so modify your testimony to that extent?

A. Yes, I'll modify to that extent, that's right.

Q. Have you ever owned or operated a facility on a river, any river?

A. No.

Q. What do you know about the operation of getting corn from a truck to a barge via elevator on the river?

A. Just from standing there watching it being done.

Q. You observed it from the outside?

A. Well, in company with the manager; if that's outside, all right.

Q. And in so observing it you have seen barges trimmed at let's say LaSalle? Where have you observed this?

A. It was at Morris.

Q. You have seen barges trimmed. What did it consist of?

A. Well, it comes down the spout and they could load in different places to keep the load level.

Q. You know how corn is handled in Chicago from barge [fol. 396] to a house?

A. No, I have never observed that.

Q. You just don't know anything about that?

A. Not from observation, no, sir.

Q. Now, if there is a five eighths cent bushel advantage at the river, why is it that contrary to the testimony that we both heard yesterday farmers aren't seeking out the river barge rather than going to the New York Central elevators?

A. Do you want me to give the farmers' thinking on that?

Q. I am asking you what the reason is. You say there's a five eighths cent advantage here. We both heard the same testimony yesterday.

A. I know, sure. I know I bought corn. My assumption would be that the country elevator man prefers to ship his corn by rail and that's the reason it has gone rail.

Q. This five eighths cent advantage at the country elevator, you are not talking about the farmer then.

Mr. Murphy: Are you talking about all farmers regardless of their location?

Mr. Freeman: I am talking about the five eighths advantage.

The Witness: This shows the five eighths advantage the river has.

By Mr. Freeman:

Q. Yes, that's what you purport to show, that's what I'm asking you, why in view of this are they not seeking out [fol. 397] the river rather than going to New York Central? We heard yesterday that they are going to New York Central.

A. Yes.

Q. And your answer is that they prefer to ship by rail?

A. That would be my assumption if the prices were equal.

Q. But the prices aren't equal on the basis of your assumption.

A. If the prices were equal at the level involved. If you are talking about, the bid to the country elevator is loaded in a box car. The bid to the country elevator by the river is in truck at the river, it is not in a barge.

Q. Your five eighths advantage that you are talking about here hasn't gotten it into the barge?

A. It is not my advantage, it is the river's advantage.

Q. Your assumption, that hasn't got it into the barge yet, it is in a truck as I understand you now?

A. Yes.

Q. At the river elevator?

A. Yes.

Q. Okay. Do all of your products go out by rail from your Kankakee house that we are talking about here, made of corn?

A. A very, very high percentage. I couldn't give you the exact figure but to all intents and purposes, yes.

[fol. 398] Q. Your products, and I take it you make both a food grade product and feed grade product?

A. Yes.

Mr. Murphy: I object to the questioning in regard to the products, Your Honor. The witness has testified in regard to the competitive bidding situation in obtaining the corn not in connection with any marketing situation and the sale of products.

Mr. Freeman: That's precisely the problem we have here, Mr. Examiner. This witness is telling half the story. He is telling it up to the point of getting it into a processing plant and that's not the whole story, and I think I should be privileged to develop the whole story.

Mr. Murphy: He has explained the competitive situation he meets in buying corn in the country in competition with people buying corn for movement by barge to Chicago and he feels he has the right to compete for the purchase of that corn and that's the story he told. I don't see how any

testimony about the marketing of his products is material to this issue.

Mr. Chartrand: Oh, I beg your pardon, it is very material to this issue.

Exam. Dahan: Do you have an objection?

Mr. Murphy: Yes, I have.

[fol. 399] Exam. Dahan: I'll overrule the objection.

Mr. Freeman: Will you read the question?

Exam. Dahan: Why don't you put it again.

By Mr. Freeman:

Q. Do your food grade products on this rate, five and a half cent rate, go to ultimate destinations in the east or are they stopped some place for further process? To whom do you sell them, categories of people.

A. I am not in the sales end, I am in purchasing.

Q. You don't know anything about sales?

A. That is correct, I don't know anything about selling the products.

Q. Well, let's look at the purchases. Can you tell me about what your actual purchases are or put it in terms of your annual grind without revealing any particular secrets.

Mr. Murphy: Will a range be sufficient so we don't disclose trade secrets?

Mr. Freeman: Yes.

Mr. Murphy: Just give it in a range.

The Witness: A range of a million or a half million?

Mr. Murphy: Give it sufficiently so you don't disclose the precise information.

The Witness: All right, nine to ten million.

By Mr. Freeman:

Q. A year?

A. Yes.

[fol. 400] Q. Bushels?

A. Bushels of corn.

Q. Can you tell me how much Chicago elevator corn you buy a year?

A. Approximately, I can't tell you to the bushel.
Q. Just approximately.
A. Well over a million bushels.
Q. Of elevator corn at Chicago?
A. From Chicago elevator, Chicago merchant elevators. If that's what you mean by elevator corn.
Q. Corn that has been in an elevator in Chicago.
A. Right.
Q. How much corn do you buy in Chicago referred to as track corn?

Mr. Murphy: At what point?
Mr. Freeman: Chicago.
The Witness: Track corn at Chicago? Well, I can't think of any specific case where you call it track corn at Chicago. To me it would be spot corn, is that what you have reference to?

By Mr. Freeman:

Q. Either one.
A. I have bought that corn from different Chicago commission people at different times, but what the volume is, I don't know. I have also bought that from country merchandisers but what the volume is I couldn't tell you.
[fol. 401] Q. Well, is all the rest of the corn, talking in terms of nine or ten million bushels, approximately a million bushels of elevator corn in Chicago, is all the rest corn you buy from Commission houses or merchants or wherever it comes from?
A. Will you restate that?

(Question read.)

A. I buy corn at all market levels, whether it is country, whether it is to the farmer, country elevator, country merchant, sub-terminal, terminal.
Q. Do you buy any Indiana corn?
A. Yes.
Q. Corn from southern and central Illinois not otherwise involved in the Kankakee belt route?
A. Say that again.

(Question read.)

A. Yes.

Q. Corn from Iowa?

A. Yes.

Mr. Murphy: Your Honor, I fail to see the pertinency. I object to these questions as being immaterial.

Mr. Freeman: It seems to me it is material where he gets his corn. How important this case is to him in terms of his total purchases. I get cut off trying to take him to destinations. He doesn't know where they go, and now [fol. 402] I am trying to go back to where he gets his corn.

Exam. Dahan: We don't need all these remarks. Let's take a five minute recess.

(Short recess.)

Exam Dahan: Come to order please. You may continue, Mr. Freeman.

By Mr. Freeman:

Q. When you buy corn in the Chicago market, do you know where it came from?

A. Do you mean by that whether it is barge billing back of it or rail billing?

Q. No, what country elevator station the corn will come from?

A. No.

Q. Do you buy corn yourself directly from a country elevator or do you buy exclusively through others?

A. No, we buy some directly from country elevators.

Q. You buy some directly from country elevators, and some through brokers and commissions?

A. Well, country merchandisers.

Q. And what proportion do you buy yourself?

A. We buy it all ourselves, but we buy—

Q. Directly from country elevators?

A. That's right.

Q. What proportion do you buy that way?

A. I couldn't tell you. We don't keep a record of it.

[fol. 403] Q. Is it a large amount or small?

A. No, it's relatively small.
Q. Do you merchandise corn?
A. We haven't in recent years.
Q. You are selling only the product out of Kankakee?
A. Currently.
Q. How currently are you talking about?
A. I don't think I have merchandised any corn in three or four years.
Q. If you see the same buyers making the same bid to a country elevator, does that mean a monopoly condition to you or does that mean competition?
A. Making the same bid to a country elevator, does that mean a monopoly? I don't know what would be back of why they were making the same bid. Maybe they didn't want to bid any higher.
Q. It wouldn't suggest anything to you?
A. Not particularly, in itself.

Mr. Freeman: That's all.

By Mr. Chartrand:

Q. Mr. Graves, you indicated in your statement that corn is in a highly competitive market and therefore fractions of a cent a bushel would turn a sale, would it not?
A. It does.
Q. And likewise if there were two competitors, two coun-
[fol. 404] try elevators bidding for corn in the country, they would have to be at a very close or the same competitive level, would they not?
A. Yes.
Q. A man that was a half a cent a bushel out of line would not for all intents and purposes, would not be in the market, would he?
A. He wouldn't buy the corn.
Q. Now, I don't understand that statement of fact how would a five eighths of a cent a bushel advantage to the barge line under your exhibit 25 that the elevators on the New York Central could ever buy this corn.
A. Are you making a statement or are you asking a question of me?

Q. Will you explain to me how an elevator on the New York Central could ever buy corn where the competitive situation was such that there was five eighths of a cent a bushel in favor of the river?

A. That would depend on the nearness to the river, nearness to the country elevator to a certain extent. It also could depend on how much that buyer would have to pocket of that cost.

Q. Well, then your figures as reflected in Exhibit 25 ignores completely the truck transportation, doesn't it?

A. Yes, it does.

[fol. 405] Q. It is not taken into consideration at all?

A. No, it does not take the truck into consideration.

Q. When you speak of grade of corn, do you mean number two yellow corn?

A. Yes, Government stamped No. 2 yellow corn.

Q. And there might be some other factors either premiums or discounts that might have to be taken into consideration apart from No. 2 yellow corn?

A. Yes.

Q. These are number 2 yellow prices?

A. Well, yes, that's right.

Q. Do you buy for your operation at Kankakee, your processing operation, any CCC corn?

A. At times, yes.

Q. You have—have you any information as to what percent would be CCC of your total requirements?

A. I couldn't tell you that.

Q. Would it be small?

A. Compared to the total, yes. It would not be large.

Q. Very small?

A. Well, if we would say around a million bushels would be small. Now I am not going to say it's a million bushels we use because I don't know the exact figure and don't know if that's within three or four hundred thousand of it. If you want to talk in quantity of bushels it's a sizable [fol. 406] amount, but it is not sizable as compared to the total amount.

Q. It is a small percentage?

A. Yes.

Q. What were your corn receipts, and I speak of free corn receipts offered this line in recent years?

A. Prior to December 15, 1956?

Q. Prior to this rate.

A. Well, I did get up a figure in '56 prior, and I think I bought less than a car and a half of corn for that year.

Q. Less than a car and a half of corn?

A. Yes.

Q. What did you buy on this line in 1957?

A. Up to the first eight months eleven hundred one cars, I believe it was.

Q. Eleven hundred and one cars?

A. That's right.

Q. So figuring a car and a half of wheat that would be approximately ninety four cars in 1956 and eleven hundred one cars in the first eight months of 1957?

A. (No response.)

Q. Does General Foods put out price bids to elevators on this line?

A. Direct to an elevator?

Q. Yes.

[fol. 407] A. No.

Q. How do you buy from elevators on this line?

A. I put bids out to country merchandisers, Chicago merchants, Chicago elevator merchants.

Q. Well, let's assume the elevator at Dwight, Illinois, for example, how would your bid come to him?

A. Through a country, well, I don't know whether you'd call him a country merchant or not, what would you call Lowell White?

Q. Is he a broker?

A. No, he takes ownership of it. He operates terminals at Indianapolis and Chicago.

Q. Would Lowell White—

A. I think the bid would get to the elevator at Dwight through Lowell White among others.

Q. Who would some of the others be?

Mr. Murphy: Is it necessary to get the names of the people?

Mr. Chartrand: Yes, this gentleman buys and we're trying to hook that up with the country. He doesn't buy direct. I am trying to find out how the price he is willing to pay gets to the man in the country.

The Witness: We have bought corn off that line from Cargill, Illinois Grain, Lowell White, Dewey; there are probably others, but I can't think of them.

[fol. 408] Q. Do you use Payne Stotler?

A. Oh, yes, pardon me, Payne Stotler.

Q. And these gentlemen, for their services there's a commission that they retain?

A. I can't say that to my knowledge.

Q. Well, they don't communicate these bids for nothing, do they?

A. Ofttimes their bids are higher than mine when they sell the grain to me, so I can't make a statement on that.

Q. Well, then is your buying really then from Payne Stotler as an example?

A. It is.

Q. And not from the country elevator?

A. That is the way I would classify it. I brought out they are principals rather than brokers.

Q. And I only mentioned Payne Stotler as one name.

A. That's right.

Q. We talk about a New York Central price, that would come to the elevator daily through Payne Stotler for example?

A. Or some other person bidding the country, that's right.

Q. And then if you were in the market for grain you would see what Payne Stotler's price was and buy accordingly?

A. No, I wouldn't say that.

Q. What else do you have to look to?

[fol. 409] A. I look at the Chicago spot market, I look at the northern Illinois rail market, I look at what the river market is. You combine them all and then you put a bid out that will try to attract the corn to you.

Q. You put a bid out?

A. That's right.

Q. To Payn Stotler?

A. To the different merchandisers, yes.

Q. That's what you are willing to pay on that day for your requirements after you evaluate it?

A. After you evaluate the whole picture, that's right.

Q. You made reference as part of that evaluation that you considered the river price. Where do you get that information?

A. From mainly the same people I give my bid out to.

Q. They are informed?

A. They are informed, we exchange bids, there's no secret about it.

Q. And from your close contact with the Payne Stotler people and others, was Exhibit 25 prepared, or is this an assumption you, an assumption of a situation you just started with?

A. No, this is just trying to bring out the fact that the river still had an advantage and what the extreme disadvantage was to us when we had to work on the Illinois [fol. 410] proportional rate.

Q. You started out with a common Chicago price?

A. That's right.

Q. And is that the way prices at the river and on the New York Central are made actually?

A. You mean are they made, are they all a common price, is that what your question is?

Q. Does the river price and the New York Central price start with a common Chicago market price actually?

A. Yes, I think it does.

Q. Well, does the eastern demand where I understand the major part of your products go, does the eastern demand or requirements have a bearing upon the country price along the line?

A. The eastern demand for our products?

Q. Eastern demand for corn or products have an important bearing?

A. Well, at times I think in the year it does.

Q. Well, is that infrequent or would you say that's most of the time?

A. I wouldn't want to make a statement as to whether it was most or infrequent or very frequent because I don't

know how often the eastern demand does control the Chicago market.

Q. Well, do you feel more strongly that it is the Chicago [fol. 411] price?

A. The Chicago price here I am using is a basic principle because corn whether it's rail or barge backed with billing is deliverable on the futures contract and after all that is your base that you start from. That's your home port.

Q. It never will get lower than that?

A. That is correct.

Q. But it could get higher?

A. It could get higher.

Q. But you don't know how much of the time it would be higher out of twelve months of the year?

A. Well, the market picture will show you that more than anything else. Usually in the fall we have discounts and then we work up to premiums over your futures in the spring months.

Q. Does General Foods at Kankakee do a corn merchandising business?

A. Not at the present time.

Q. Did they at any time through 1957?

A. No.

Q. Not at all?

A. Not in 1957.

Q. Have they at any time during 1958?

A. No.

Q. I may have overlooked it but did you state what your [fol. 412] requirements of corn at that time at Kankakee was?

A. Yes, I did, I think I said nine to ten million bushels.

Q. What happens when you get to the point that your requirements are met? Do you pull out of the corn market?

A. Yes.

Q. Does the Chicago market ever pull out?

A. There are two ways you can pull out of the market, that is by reducing your bid below what the going market is, or pulling out your bid completely. Only certain times of the year do I pull out completely. Other times I'll pull

my bid down. Again that would be hearsay on my part. I have known Chicago to do the same thing, not pull out completely, there's always somebody there with a bid, but they will lower the bid if the offerings get heavy.

Q. Depending on the competitive situation?

A. That's true.

Q. For what periods do you pull out of the market, and I'll refer to 1957. We won't go beyond that.

A. Well, there are times, you mean pull out completely, not lower my bid?

Q. Pull out completely.

A. That is more apt to happen ahead of the movement of new crop.

Q. For about what period of time?

A. It might be a period of two weeks, three weeks, it [fol. 413] might even be as much as a month.

Q. As much as a month?

A. That's right, depends on how I am covered.

Q. Then considering the periods in which you lower your price because your requirements have largely been met or have been met, is that lowering of price for like periods?

A. No, that would be only of short duration.

Q. Temporary or short duration?

A. Yes.

Q. What commodities are manufactured from the corn you purchase at Kankakee?

A. Well, there's corn grits, corn flour, corn meal.

Q. Just a minute please, and I'd just as soon have about five of the major ones.

A. Corn grits, corn flour, corn meal, corn oil and hominy feed. That will give you five, won't it? If you need another one you can have corn flakes if you want it.

Q. Corn flakes. What are grits worth?

A. I frankly couldn't tell you.

Q. But there are established competitive values of grits and these commodities published, are there not?

Mr. Murphy: I object to this line of questioning, Your Honor. The witness testified about competitive situation in the purchase of grain.

Mr. Chartrand: I'll withdraw the question.

[fol. 414] By Mr. Chartrand:

Q. What effect did the establishment of the five cent rate have upon the prices you furnished Payne Stotler for example that you were willing to pay after December 15, 1956?

A. What effect?

Q. Did you raise your bid?

A. Yes, if you are talking about at a country station, yes, the bid was several cents higher.

Q. But you make your bid to Payne Stotler. What

A. I raised my bid to Payne Stotler.

A. I raised by bid to Payne Stotler.

Q. The reduction in rate had the effect of raising your bid to Payne Stotler?

A. On the basis of the country station involving the country station, yes.

Q. Then when the five and a half cent rate was enjoined, what happened to your bid immediately to Payne Stotler?

A. There was no bid for that billing at that time. There was the regular northern Illinois bid which went along as it did before.

Q. You were really out of the market then at that time?

A. Yes, until I re-entered.

Q. Then there was a direct relationship between the establishment of the five and a half cent lower rate and the increase in your bid price?

[fol. 415] A. Based on country elevator.

Q. Or to Payne Stotler?

A. Yes.

Q. Do you buy any truck corn?

A. Yes.

Q. Is it a sizable amount?

A. Yes.

Q. Does it come from the territory served by the New York Central along this line?

A. Adjacent to Kankakee, yes.

Q. Adjacent to Kankakee?

A. I mean by that a radius of oh, ten, maybe fifteen miles.

Q. Of Kankakee?

A. Yes.

Q. Does it stretch as far west as Union Hill?

A. At times.

Q. Then you are competitive with the elevator at Union Hill in so far as—

A. No, I don't buy any quantity direct from farmers, my truck bid is to merchandisers, country merchants also. In percentage I said I bought at all market levels, but the percentage direct from farmers is insignificant.

Q. Well, tell me on a single truck load from a nearby point hauled to your elevator at Kankakee, your elevator at Kankakee, who do you pay for that corn?

[fol. 416] Mr. Murphy: Your Honor, the testimony here was to the competition between the barge bids and the rail bids. I don't know whether this is material or pertinent to the direct examination.

Mr. Chartrand: There are other forms of transportation involved besides water here.

Exam. Dahan: Objection overruled.

The Witness: Would you state again what your question was?

By Mr. Chartrand:

Q. Well, on corn trucked to your elevator at Kankakee, who do you pay for that corn?

A. Country merchandisers.

Q. Country merchandisers?

A. Or if, whoever, I mean above the country elevator level whoever we bought the corn from above the country elevator level.

Q. Would it be Payne Stotler?

A. In some cases.

Q. Or possibly an interior country elevator for whose account it was brought to Kankakee?

A. That is right.

Q. Located on a railroad?

A. It could be located on a railroad but within a close-in area to Kankakee.

Q. Do you have a corn dryer at Kankakee?

[fol. 417] A. Yes.

Q. Well, is there in connection with that drying of corn in so far as the price you submit to Payne Stotler, some type of a discount scale, to cover higher moisture corn?

A. Yes.

Q. What is that scale? Is it uniform or does it change from day to day?

A. Well, it hasn't changed since the start, shortly after the start of the new crop movement, my moisture discount has been unchanged.

Q. At what point does your moisture discount scale start?

A. Fifteen point five percent.

Q. Fifteen and a half percent, and what is the progression? At fifteen and a half percent then there is no discount?

A. That is correct, on moisture.

Q. That's correct, moisture, and all other things being equal the basic number two yellow corn would be paid there?

A. That's right.

Q. For moisture content above fifteen and a half percent what is the rate of progression?

A. One cent for each half percent up to twenty-three percent moisture.

Q. Is that a discount scale that is observed by all of the grain buyers in that territory?

A. That is rather a complicated situation, competition [fol. 418] in some areas is on the one cent scale, in other areas it is on a one and a half cent scale. Even the Chicago spot market the prices paid are extremely high over the futures but then they use the one and a half cent scale and it brings it down to where it is comparable to the one cent scale, the difference is in the price that you put a basis two. You can have a high price for basis two, and a one and a half cent scale and when you get down to the actual price of corn they'll just about equal out. They come out recently, I wouldn't say recently, we'll say for a period of time here going back into '57, with three bids for Number 2 corn, one will be, it will carry a one and a half cent scale, it will be a lower bid. Then they'll pay a higher price over nineteen one moisture but it's still basis two, but your dis-

counts start at a higher price. Then there will be another at twenty point one or twenty point six, so it's very hard to evaluate just what the difference in moisture scales would bring out. Actually, this is my opinion, the one and a half cent scale reflects an incorrect value. That is my opinion because at the current price levels of corn it does not require one and a half for each percent to cover cost on shrink and drying. I think one cent on a half percent is a more realistic figure and I would think that would be true until the market moved up to a higher price, but you [fol. 419] have to bear in mind the price for Number two on a one cent scale is lower than the price for two on a one and a half cent scale.

Q. By how much?

A. Well, it runs from three and a half, four, four and a half cents a bushel.

Q. Could I conclude then somewhere between three and four and a half cents?

A. That's right. It's in a range, that's all.

Q. Three or four cents lower price basically—

A. For two based on the one cent scale against two based on the one and a half scale.

Q. All right. Then let me see if I understand that correctly. Would it be a fair statement for me to say that the one and a half cent discount for every half percent moisture over and above fifteen and a half is by and large, over the years has been a standard discount?

A. No, I don't know that it has. It has for the last couple years depending on the price level of corn, but nobody in the market is going to stay at one and a half if we have two dollar corn, I'm telling you right now.

Q. But in so far as discount scales are concerned, is the one cent really an exception to the one and a half or is the one and a half an exception to one cent, if it could be stated that way?

[fol. 420] A. I have considerable amount of competition on the one cent scale, so I would say the Chicago market is on the one and a half, the Iowa market is on the one.

Q. What would Indianapolis be on?

A. Frankly I couldn't tell you right now, because I do not buy corn from Indianapolis.

Q. What would Decatur be on?

A. One and a half.

Q. Paris, Illinois?

A. I don't know what their bid is, and as far as Decatur, the only reason I know that is from what somebody told me.

Q. Fine, I think that's enough on this moisture discount scale, except I'd like to refer back to your Exhibit 25 where you show let's say a very close pricing picture between the river price and the New York Central price on basic corn.

A. Basic Number 2 Corn?

Q. Basic Number 2 corn, but if the river was on a one and half cent scale and you were on a one cent discount scale, then that would change the five eighths of a cent advantage to the river, wouldn't it?

A. No.

Q. Under the dollar nine cents?

A. No, it would depend on what the bids were.

Q. You have bids here at both the elevators?

[fol. 421] A. It would depend on what the level of the bids was.

Q. You have approximately the same level?

A. That is correct there because we are talking about No. 2 corn.

Q. I am going on the assumption for the foundation for the two scales it will be these prices, but you say that in fact that would not be so because of the one price for the cent and a half discount scale and another separate price for the one cent discount.

A. Yes, the basis two would be on different levels because of the difference in moisture scales.

Q Is there anyone else in Kankakee, an industry that is a receiver of corn?

A. There's a little feed mill, A. L. Book, he's a member of the Board of Trade.

Mr. Chartrand: I believe that's all. Thank you.

Mr. Murphy: No questions on redirect.

Exam. Dahan: The witness is excused. Is there any objection to Exhibit 25? If not, Exhibit 25 will be received in evidence.

(Applicant's Exhibit No. 25, Witness Graves, was received in evidence.)

Mr. Bradford: We are going to put Mr. Schaller on next because it is necessary for him to leave town.

[fol. 422] L. W. SCHALLER was sworn and testified as follows:

Direct examination.

By Mr. Bradford:

Q. What is your name?
A. My name is L. W. Schaller.
Q. Where do you reside, Mr. Schaller?
A. Indianapolis, Indiana.
Q. What is your occupation?
A. Traffic manager for Evans Milling Company.
Q. And how long have you been so employed?
A. Sixteen years.
Q. And what business is the Evans Milling Company engaged in?
A. We operate a dry corn mill.
Q. And what is a dry corn mill?
A. A corn mill who processes corn by the dry process.
Q. Have you had any previous transportation experience before being connected with Evans Milling?
A. Twenty-six years in rail transportation.
Q. What railroads were they?
A. Nickel Plate, Monon, and Chicago Atkinson and Southern.
Q. Have you any official position with the Indianapolis Board of Trade?
A. I am vice president of transportation committee.

Q. And Evans Milling are members of the Board of Trade?

A. That's right.

[fol. 423] Q. What products does the Evans Milling Company produce?

A. Corn grits, corn meal, corn flour, brewers flakes and hominy feed.

Q. Are all these products manufactured from corn?

A. They are.

Q. What is the source of your supply of corn?

A. We receive corn from Indiana, Illinois, trans-Mississippi territory, sometimes from the northwest territory.

Q. Do you at times buy corn originating at the west end of Kankakee belt on the railroad of the New York Central?

A. We have.

Q. How long have you made such purchases?

A. We purchased corn for eight months in 1957 and we have also purchased corn since the temporary injunction was lifted in 1957 and '58.

Q. What was the effect of the five and a half cent rate here under consideration? What was the effective date?

A. December 15, 1957.

Q. Do you consider that rate to Kankakee as a rate standing by itself?

A. It is not.

Q. What is the purpose of it?

A. It is a proportional rate which can only be applied when the traffic moving under it has been milled in transit.

Q. Now prior to December 15, 1956, did you make any [fol. 424] purchases of rail corn from the west end of the Kankakee Belt?

A. Evans Milling Company received no corn for the fifteen years prior to that time from any of those states.

Q. That is rail origin corn?

A. Rail origin corn.

Q. And why did you not make purchases at that time?

A. It was not offered to us.

Q. Do you know of any movement at this time of corn to any other industry or merchant in Indianapolis from the Kankakee Belt?

A. There is a small movement last year which went to other processors at Indianapolis.

Q. Have you made an investigation of the records of the Indianapolis Board of Trade to determine the total amount of corn moving from the Kankakee Belt to Indianapolis while this five and a half cent rate was in effect?

A. There was in the neighborhood of two hundred sixty cars moved to Indianapolis.

Q. Did your investigation develop any movement prior to the institution of the five and a half cent rate?

A. No.

Q. And how many cars did the Evans Milling Company receive on the five and a half cent rate?

A. We received two hundred nineteen cars.

Q. Of the two hundred nineteen cars received by you [fol. 425] where were they purchased?

A. We purchased them through various grain merchandisers at Indianapolis and on the floor of the Indianapolis Board of Trade.

Q. In fact the entire amount received by you was purchased on the floor of the Indianapolis Board of Trade?

A. Either on the floor or through merchandisers who operated on the floor.

Q. Did you purchase any of this corn from any of the protestants involved in this proceeding?

A. The two hundred nineteen cars we purchased eighty-three from the Cargill Grain Company who are protestants in this proceeding.

Q. And the eighty-three cars were rail movement?

A. That's right.

Q. Now on what basis were they purchased?

A. They were purchased on the basis of the five and a half cents rate to Kankakee plus a proportional east.

Q. In your duties as traffic manager are you consulted by the purchasing department of your mill?

A. I am.

Q. And assuming that an amount of corn is offered to your purchasing department, are you consulted before they purchase it?

A. Yes, they inquire as to the application of the transit [fol. 426] and rates from the origin of the country elevator

to shipping point, whether or not we can use it and on what basis it can be used, and whether or not it has any advantage or disadvantage to us.

Q. To that extent you are familiar with the purchase of corn at your plant?

A. I am.

Q. Now, is there anything special about the billing received by you for your contract purchase in connection with this corn originating on New York Central Kankakee Belt?

A. We bought it and our contract specified, as I recall it they had to put it so it could be used on this basis.

Q. How do you mean on this basis?

A. On the basis of the five and a half cent rate to Kankakee.

Q. What was the qualification to become necessary to make it five and a half cent rate?

A. You had to have a hundred thousand pound minimum and we would have to mill it in order to use the five and a half cent rate.

Q. In other words you get the whole corn in and then mill it?

A. That's right.

Q. After that the five and a half cent rate will apply. Now in the manufacture of your product do you have a certain [fol. 427] amount of shrink?

A. We have a shrink in the manufacture of our product due to shrink and manufacturing loss.

Q. What does that shrink amount to, do you know?

A. About five percent of the total weight.

Q. On that five percent of total weight, what was the rate that was paid?

A. That was the local rate to Indianapolis.

Q. Did the five and a half cent rate apply on that?

A. That did not apply on the shrinkage.

Q. In connection with the shrinkage, what are the total requirements, yearly requirements for your operation at Indianapolis, your receipts?

A. What was that question?

Q. What is the yearly requirement of corn for your operation?

A. For our mill, we'll process about twenty thousand bushel a day, between three to four million I would say, sometimes it's a little more.

Q. Five percent of that is all originated on the Kankakee line at the full local rate?

Mr. Chartrand: There's nothing in this record that shows it all comes off the New York Central.

Mr. Bradford: I'll withdraw the question.

By Mr. Bradford:

Q. Did you ever buy corn at Indianapolis from any other [fol. 428] firms, Indianapolis firms, this particular corn?

A. We bought some west end corn from Early and Daniel Company, Lowell Hoyt Company and Norris Grain Company.

Q. Norris Grain Company operate a river elevator?

A. They do.

Q. How much corn did you buy from Norris Grain Company?

A. There was only seven cars from them.

Q. Did they have an Indianapolis office?

A. At that time they did.

Q. And you purchased through that office?

A. Yes, sir.

Q. Will you explain just how your transit operations are transacted at Indianapolis?

A. On receipt of the corn it is unloaded, weighed, inspected and after the bills are paid they are registered with the Eastern Weighing and Inspection Bureau. They police the transit and on our outbound shipments your inbound billing is surrendered against the outbound.

Q. Is there a movement of corn from the car into your plant?

A. There is from the inspection yards, inspection tracks of various railroads.

Q. I mean was the car unloaded at your plant?

A. Yes.

[fol. 429] Q. What was done with the corn after it was unloaded? Was it placed in storage?

A. Yes, we have an elevator.

Q. What is the capacity of that elevator?

A. Eight hundred thousand bushel.

Q. Now, I think you said you were a member of the transportation committee of the Indianapolis Board of Trade?

A. I am.

Q. Was this matter ever considered by that committee?

A. It was considered by the committee.

Q. And what was the action of the committee?

A. The transportation committee voted to support the application of the New York Central Railroad in securing Fourth Section Relief with the provision of assurance from the New York Central that after the Fourth Section application was disposed of they would present a proposal to eliminate the milling in transit feature and make the five and a half cent rate, proportion rate applicable on whole corn.

Mr. Chartrand: May I inquire, Mr. Examiner, is he testifying on behalf of the Indianapolis Board of Trade?

Mr. Bradford: Yes, I asked him if he was a member of the Committee.

Mr. Chartrand: That doesn't mean he is testifying on their behalf.

[fol. 430] Mr. Bradford: Well, he is.

By Mr. Bradford:

Q. Was that action of the committee unanimous?

A. It was not.

Q. How many dissenters were there?

A. There was one.

Q. What was the name of that dissenter?

A. Indiana Grain Corporation.

Q. Did the Cargill Company have a member on that committee?

A. I don't recall whether he was there or not.

Q. Mr. Schaller, I believe you have prepared an exhibit, and may we have it identified, Mr. Examiner?

Exam. Dahan: It may be marked as Exhibit No. 26.

(Applicant's Exhibit No. 26, Witness Schaller, was marked for identification.)

By Mr. Bradford:

Q. Mr. Schaller, did you prepare Exhibit 26?

A. It was prepared under my supervision.

Q. Do you know the contents of this exhibit?

A. Yes, sir.

Q. Are the contents true and correct to the best of your knowledge and belief?

A. To the best of my knowledge and belief it is.

Q. Will you proceed to explain the exhibit in your own way?

A. This Exhibit I undertook to show the movement of [fol. 431] corn from the west end New York Central stations to the quantity and origin points, and to the revenue which accrued to the rail carriers in the movement of this traffic. Page three of the exhibit shows the origin stations, and—

Q. Pardon me, these are origin stations on the New York Central Railroad from which you actually received corn?

A. That's right, and the average mileage when we had a weighted average of 24.95 miles, average distance to Kankakee which was used. On page five is the statement showing the average miles to Kankakee and the distance from Kankakee to Indianapolis. On the shrink tonnage the railroads received revenue based on the rate to Indianapolis which was the local rate and in my estimation part of that revenue accrued to the line of the New York Central west of Kankakee and part of that revenue accrued to the New York Central between Kankakee and Indianapolis, and I undertook to prorate in my figures that revenue and on page six it shows the number of cars received from each group together with the gross weight. The net weight for transit, the charges on the transit rate to Kankakee based on the five and a half cent proportional rate, it shows the shrinkage or manufacturing loss on the inbound rate, the charges on the shrink, the shrink allocated west of Indianapolis or west of Kankakee, the total net inbound charges to Kankakee. On a weighted average the New York Central [fol. 432] accrued $59.42 per car.

Q. To Kankakee?

A. To Kankakee, and $2.38 was their average per car mile earning to Kankakee. Average inbound weight of this corn was a hundred nine thousand, a hundred thirty-seven pounds.

Q. Before you go further on the inbound movement to Indianapolis, what rate was paid?

A. I believe it was thirty-three cents.

Q. I know, but it was the full local rate?

A. That's right.

Q. And when did you receive the benefit of the five and a half cents?

A. After it was transferred out? On page seven it shows the outbound movement of this corn or traffic on which billing covering this corn was applied. The destinations are separated by states, number of cars, the distance from Kankakee, the explanation of routes or at least route numbers, the total weight in actual pounds, the proportional rate from Kankakee to the ultimate destination, outbound charges on the total weight, the total earnings east of Kankakee, the earnings per car and per car mile, the total revenue west of Kankakee and the earnings through their point of origin to destination, and the total earnings inbound and outbound which shows the average per car [fol. 433] revenue which the rail carriers received on this traffic was $407.38, and the average per car mile earning of sixty-one and sixty-two hundreds cents.

Page eight and nine is an explanation of the routes used and the tariff authority.

Q. Mr. Schaller, do you know the present rate on corn using this five and a half cent rate plus the reshipping rate from Kankakee to New York?

A. Fifty-four cents.

Q. That's on corn?

A. Fifty-three and a half.

Q. What is it on product?

A. Fifty-four.

Q. And do you have some other charges in Indianapolis when you mill this corn in transit?

A. We have a milling in transit cost of a cent and a quarter per hundred pounds.

Q. Is that transit charged, is that transit charge applied to corn anywhere west of the Illinois State line?

A. Not to my knowledge.

Q. During the years of your experience with the railroad did you have occasion to observe the operation of the country elevators?

A. I observed it there and we also have an elevator at our mill.

[fol. 434] Q. So the operation of a country elevator, can you explain the operation of moving the corn from the farm to the country elevator and reshipping from the country elevator?

A. Well, the corn is brought to the country elevator. There it is weighed, it is tested, it is unloaded, and then it is elevated to the elevator. After that if the elevator sells it, it's re-elevated and loaded into a box car.

Q. Have you ever had occasion to observe the loading of barges on the Illinois River?

A. No.

Q. You don't know anything about that?

A. Nothing from my own knowledge.

Q. Now, prior to the establishment of the five and a half cent proportional rate, did you ever buy any river corn at Chicago?

A. Yes, sir.

Q. On what basis was that purchased?

A. It was purchased on the reshipping rate from Chicago.

Q. Have you bought any river corn since that time?

A. Since what time, since the establishment of the five and a half cent rate?

Q. Yes, sir.

A. Yes, sir.

Q. Why did you buy river corn in preference to rail corn?

A. It wasn't, rail corn apparently wasn't available. It [fol. 435] wasn't offered to us. We didn't buy any corn off the Kankakee Belt during the time when the rate was under temporary restraining order.

Q. But you have since?

A. We have since.

Q. Now, I think you said before the institution of the five and a half cent rate you bought corn in Chicago from the river operators?

A. Yes, we bought a lot of corn in Chicago.

Q. And was that the only market you had for this corn adjacent to the Illinois River?

Mr. Hayes: I didn't hear that question.

By Mr. Bradford:

Q. Was that the only place to purchase you had for this corn adjacent to the Illinois river?

A. That's right.

Q. Did you consider it as a practical grain man and mill operator a desirable situation to be limited to one market for the purchase of your supplies?

A. No, we like to maintain ourselves in a position where we would have competitive bidding on corn and certainly I don't think it would be a very good practice or a healthy situation to be bound to one source of supply.

Q. Even from the same origin territory?

A. That's right.

Q. In other words do you think Chicago has any right to [fol. 436] insist that all the corn in certain territories come to Chicago?

A. Well, I don't think any market has got any God given right—

Mr. Chartrand: I object to the question because it raises an inference that that is the position of the Chicago Board of Trade which is not the fact.

Mr. Bradford: I was just basing it on some questions you asked about Chicago losing business.

Mr. Chartrand: That's one thing, but the position of Chicago was inherent in that.

Mr. Bradford: The position of Chicago wasn't even stated when you entered your appearance because you stated you were in favor of the application and then you turned around and changed your position.

Exam. Dahan: Objection sustained.

By Mr. Bradford:

Q. Now, in the application of the transit tariffs at Indianapolis, is it a practice for the inbound carrier to receive the outbound haul?

A. That is true in every case except the Illinois Central and the Monon, and there's some exceptional arrangements that apply in connection with the Pennsylvania and the B&O where they have some kind of a reciprocal arrangement, whereby traffic off the B&O can move out Pennsylvania and vice versa, otherwise the inbound carrier must receive the outbound movement.

Q. In connection with the rate here under consideration, [fol. 437] the movement by rail to Indianapolis, is the New York Central always assured of an outbound haul?

A. That's right.

Q. Now, in that case the New York Central on movements through Indianapolis are assured of their five and a half cent rate plus the rate beyond Indianapolis to some destinations, is that correct?

A. They are assured of the five and a half cent rate to Kankakee and they are assured of participating in the proportional rate.

Q. And they are assured of a haul out of Indianapolis?

A. That's right.

Mr. Bradford: I believe that's all, Mr. Examiner.

Cross examination.

By Mr. Hayes:

Q. Just one or two questions. Do members of the Indianapolis Board of Trade engage in grain marketing?

A. They are, some of them are.

Q. Would that be true of most of them?

A. Yes.

Q. Are you engaged in grain marketing, your company, the Evans Milling Company?

A. To a very limited extent, once in a while we'll merchandise some corn.

Q. Prior to the institution of this five and a half cent [fol. 438] rate, has your company bought X rail grain at Chicago?

A. X rail?

Q. Yes.

A. Yes, sir.

Q. And prior to the institution of that rate has your company bought X rail grain at Chicago when X barge grain was also available there?

A. I can't answer that question. I don't know whether barge grain was available.

Mr. Hayes: All right, that answers it. That's all.

Mr. Legg: I would like very much to recess right now so I can look at this exhibit before I cross examine.

Mr. Bradford: Mr. Legg, I would like to ask your indulgence to this extent. This man has to catch a plane. He has to leave the hotel at three o'clock. I don't know how long you are going to take but if we recess until two o'clock, I'm sure he won't make connections.

Exam. Dahan: We'll dispose of cross examination of this witness before we recess.

Mr. Legg: I'll let Mr. Freeman go first.

By Mr. Freeman:

Q. Are there other transit points that have a transit charge?

A. In what territory are you speaking?

Q. Central territory and the eastern territory.

A. Yes, sir.

[fol. 439] Q. So that your transit charge is not unique?

A. I would say it is very unique in the corn milling industry in so far as the total capacity of the milling is concerned.

Q. What is the unique feature?

A. For the simple reason that the majority of the corn millers in Official Territory do not pay.

Q. I thought you just told me—

A. You asked me if there was a transit charge, if it was unique if there were other millers who had the transit charge and I said yes, there are other millers, but they are in a very small minority.

Q. What mill is located in Buffalo?

A. There is no corn mill in Buffalo that I know of in competition with us.

Q. Are there corn mills in Buffalo?

A. None that I know of.

Q. None in competition or none that you know of?

A. There is no corn mill that I know of in Buffalo.

Q. How long have you had this transit charge for a penny and a half?

A. It's a cent and a quarter. It originally started out as a half cent, as far back as I can remember in Indiana.

Q. Is your elevator at Indianapolis physically connected to your mill?

[fol. 440] A. Not the tanks, the tanks are not themselves.

Q. What is the operation of your mill of getting the corn from the elevator to your mill to process and grind it?

A. A belt.

Q. The corn you buy from Kankakee, did you describe the handling as being from one of the country elevators?

Mr. Bradford: He didn't say he bought any corn from Kankakee.

Mr. Freeman: The Kankakee Belt, have you described that operation as being from the country elevators to your elevator in Indianapolis?

The Witness: Have I described it?

Mr. Freeman: Yes, the operation—

Mr. Bradford: May I interpose this, Mr. Freeman, he testified all the Kankakee corn he bought from brokers or dealers on the floor at Indianapolis.

Mr. Freeman: Yes, and I am asking what the movement was.

The Witness: Are you asking me have I described it?

By Mr. Freeman:

Q. I am asking you if I am correctly interpreting the description I thought you gave.

A. I don't know that I gave one.

Q. What is the nature of the movement from the Kankakee Belt to Indianapolis from a country elevator?

A. From a country elevator?

[fol. 441] Q. Yes.

A. Well, the cars are loaded by the country elevator. Do you want me to start at the beginning?

Q. That's good enough. What happens?

A. Cars are moved to Kankakee by New York Central from Kankakee to Indianapolis.

Q. That's all that happens to it?

A. Car is placed on inspection track, it is inspected by the Indianapolis Board of Trade and if it is billed to a concern like Cargill or Early and Daniels, they order the cars to us. If it is billed to them or billed direct to us on an order bill of lading, the cars are immediately moved to our plant where they are inspected.

Q. What are the, what do the miles represent that are shown on your page seven, are those the actual route of movement miles?

A. That's right.

Q. Not the short tariff mile?

A. No, they are the actual movement miles via the route in which the cars travel.

Q. Have you checked your freight bills to determine what the routes were?

A. That's right.

Q. Are you regularly in the Chicago market for corn?

A. What do you mean by regularly, you mean every day?

[fol. 442] Q. You tell me how often you are in the Chicago market.

A. That somewhat depends on the supply of corn which is in Indianapolis.

Q. And you buy in the Chicago market when you can't get country run corn at Indianapolis or can't get corn in Indianapolis?

A. Or maybe if the price was better in Chicago than it would be in Indianapolis. There's various things that go with that.

Q. Does your mill prefer country run corn?

Mr. Bradford: Are you qualified to answer that question?

Mr. Freeman: He has been pretty free today.

The Witness: I would say that we have to have a good grade of corn. We can't use just any kind of corn in the manufacture of our product, and again that would depend on whether or not the corn in the country was better than the corn in the elevator or otherwise.

Mr. Freeman: Can you buy corn in Chicago from several sellers?

The Witness: I presume we can.
Mr. Freeman: That's all.

By Mr. Chartrand:

Q. May I inquire, Mr. Schaller, the figure you show on page seven, the lower right hand corner, is that the earnings per car mile on these shipments from the origin of the [fol. 443] grain on the Kankakee Belt Line to final destination?

A. That's right, that's what I intended it to be.

Q. Yes, and that would be sixty-one plus cents per car mile?

A. Yes, that's right.

Q. In so far as the outbound shipments are concerned what product of corn could it mostly consist of or do they consist of more than one?

A. I would say that these shipments represent all of the products which I named.

Q. All of the products. I see. In so far as the outlet for your commodities, to what territory do you go?

A. We go to Official Territory and to Southern Territory.

Q. Is it predominantly to the Official or to the Southern?

A. Official Territory.

Q. Well now, as between, within the Official Territory is it predominantly to the trunk line or the CFA?

A. Trunk line.

Q. Do you have a dryer at your plant?

A. Yes, sir.

Q. Under what moisture scale do you operate?

A. The Indianapolis Board of Trade?

Q. You, the Evans Milling Company.

A. You mean discount scale?

[fol. 444] Q. Yes.

A. I am not qualified to say.

Q. You don't have any idea?

A. It's all hearsay.

Q. Do you know what the Indianapolis Board of Trade Standard is for moisture content?

A. I think it is one and a half cents per half a percent moisture.

Q. Are you acquainted or are you familiar with the fact that there is a different buying base on corn whether the one cent discount scale is used or the cent and a half?

A. No, as far as that is concerned, I am not qualified.

Q. When this whole corn moves into Indianapolis is the full rate paid from the origin to you?

A. That's right.

Mr. Bradford: Origin to Indianapolis?

Mr. Chartrand: Yes.

By Mr. Chartrand:

Q. Then when you go to the trunk line territory you get credit for the pay-in?

A. That's right.

Q. From a joint through rate based on the five and a half cent combination over Kankakee.

A. When we transit a shipment out we would construct our rate on the outbound shipment based on five and a half cents to Kankakee plus the reshipping rate on the corn [fol. 445] products from Kankakee to ultimate destination, we would deduct the inbound rate paid to Indianapolis, we would pay the railroad the difference between the through combination rate or the total combination rate less the paid in factor.

Q. Now suppose you were shipping your products out of Indianapolis to Muncie, what would be the rate to Muncie?

Mr. Bradford: He hasn't shown any movement to Indiana on the exhibit.

By Mr. Chartrand:

Q. I am asking if he made a shipment to Muncie what would be the basis of rates on your products to Muncie?

A. That would be the five and a half cent rate to Kankakee and the reshipping rate from Kankakee to Muncie.

Q. Would your paid in rate take in more than that combination?

A. I don't know what the rate to Muncie is from Kankakee.

Q. Well, you know the proportional rate isn't very much higher than it is to Indianapolis.

A. I don't want to venture a guess, because I don't know. I know what the range is approximately.

Q. If the five and a half cent combination to Muncie were lower than the paid in to Indianapolis would you suffer a loss under the three way rule?

A. If I had a three way rule.

[fol. 446] Q. Do you have a waiver of the three way rule?

A. I don't have the three way rule.

Q. You don't have any. Then there's just no three way rule penalty that could arise at Indianapolis?

A. That's right.

Q. This five percent that you speak of, is that canceled off each inbound freight bill?

A. It is.

Q. Actual loss or is it a—

A. It's a five percent loss and at the end of each quarter if the shrinkage is more or less your transit account is adjusted accordingly. We have to make quarterly inventory and every time the railroads change their freight rates we have to make an inventory.

Q. Do you know what grits are worth?

A. I don't have any idea.

Q. I believe you testified that the rate to New York from Kankakee was fifty-three and a half on corn?

A. On corn.

Q. And fifty-four on product?

A. Fifty-four on product.

Q. In other words products of corn are one half a cent higher than the rate on whole corn?

A. That's right.

Q. Is that generally true from let's say all of Indiana [fol. 447] to New York?

A. That's right.

Q. All of Ohio to New York?

A. That's right.

Q. And from Michigan?

A. That's right.

Q. And from Illinois?

A. Yes.

Q. And has that relationship of grain products or products of corn been in existence many years?

A. Yes, to trunk line territory.

Q. Do you receive any of your inbound corn from this line into Indianapolis on the IC?

A. No, sir.

Q. Could it move that way?

A. No, sir.

Q. Does not the proportional rate from Kankakee apply in connection with the IC Indianapolis and connecting lines?

A. I don't recall whether it does or not. We have never moved any that way. We have never received any corn in connection with the IC out of Chicago. I mean IC direct to Indianapolis. I never took the opportunity to check it. I never took the trouble. It never moved that way.

Mr. Chartrand: That's all. Thank you.

Exam. Dahan: Do you have any questions, Mr. Legg?

[fol. 448] By Mr. Legg:

Q. On page seven of your exhibit, the column headed total earnings east of Kankakee, Illinois, do those include the earnings both of New York Central and all connecting carriers?

A. Yes.

Q. You do not have any idea of what the division between the New York Central and the connecting carriers would be, do you?

A. I certainly do not.

Q. You testified that you had bought river corn or X barge corn at Chicago since the five and a half rate was first promulgated?

A. That's right.

Q. Was that while the five and a half cent rate was then in effect or not?

A. We buy corn in Chicago.

Q. Excuse me, could you give me a yes or no answer to that question?

A. Then repeat your question.

Q. Will the reporter read the question please?

(Question read.)

A. Let me ask you this. Are you talking about the time since the injunction was lifted or during the time of the injunction or prior to that?

Q. I am talking about any time you have made an X [fol. 449] barge purchase in Chicago subsequent to December 15, 1956, at any time was the five and a half cent rate in effect when you made that purchase?

A. Yes.

Q. About when was that made?

A. I can't give you the date.

Q. Beg pardon?

A. I can't give you the date.

Q. Could you give me the month?

A. I think we bought some in December '57.

Q. X barge?

A. Yes.

Q. About how much was that?

A. I don't know. I just saw the freight bills come in and saw that there was X barge billing in back of them.

Q. Do you know about what proportion of X barge corn you have bought since December 15, 1956 and excluding the period that the temporary restraining order was in effect as compared to a like period in previous years?

A. I don't believe I could tell you any relationship one versus the other.

Q. So far as you know the purchase of the X barge billing was an isolated purchase then?

A. No, I wouldn't say that. We bought considerably more grain which was transported by barge to Chicago. I saw we [fol. 450] have bought considerably more grain which was transported by barge to Chicago than we have been able to get off the New York Central.

Q. Since the five and a half cent rate was in effect?

A. At any time, before and after.

Q. Are you talking now about grain or corn specifically?

A. We only deal in corn.

Q. Then you could not say whether your purchases of X barge corn have decreased or increased since the five and a half cent rate went into effect or while it was in effect?

A. I can't say that it has either increased or decreased or whether there has been any change in it. We may have bought just as much.

Q. You do not know?

A. I don't know.

Mr. Legg: I have no further questions.

Exam. Dahan: Do you have any redirect, Mr. Bradford?

Redirect examination.

By Mr. Bradford:

Q. Mr. Schaller, Mr. Chartrand asked you about the kind of corn you used in milling. Now the corn the Kankakee Belt corn you bought in Indianapolis was bought on the floor after inspection. Was there any advantage in that purchase?

A. Well, certainly if you can see the grades and the sample of the corn, why you know what you're getting. If [fol. 451] it isn't good corn we don't have to buy it, and I believe that there has been many times that we have bought corn from Chicago which was bought on the Chicago grades and weights and in that case it is our corn after it is shipped provided that it meets the grades specified in our contract, however I don't think all Number 2 corn is the same, I mean from milling standpoint.

Q. Does the movement of corn in the Kankakee Belt line to Indianapolis move through any terminal market, the rail movement?

A. From the Kankakee Belt Line it comes direct to Indianapolis which is a terminal.

Q. But there is no intermediate terminal market?

A. No.

Q. Now, on Exhibit 26 on page seven, you show the routes?

A. That's right.

Q. You show two cars to Massachusetts, 1298.8 miles, two cars 1312.8 and one car 1296.8. Did those numbers of cars and the mileage represent a given destination?

A. They do.

Q. You took the destination?
A. I took the destination.
Q. So that is the number of cars to that destination?
A. Yes.
Q. But you did not show the destination and did not show [fol. 452] the customer's name?
A. That's right.
Q. And you did that for business secrets?
A. We done it for competitive reasons, that's right.

Mr. Bradford: That's all.

Recross examination.

By Mr. Legg:

Q. I have one further question. Referring to the number of cars to which Mr. Bradford has just directed your attention, is that the actual number of cars that were used to move the processed products from Indianapolis?
A. Talking about those five cars to Massachusetts?
Q. Well, the 282 cars total, yes.
A. That's right.
Q. Is that just a coincidence that that's the same number of cars that you got from the Kankakee Belt?
A. That is not the same number of cars I got from Kankakee Belt. I got 291 in and 282 out.

Mr. Legg: I see. I have no further questions.

Offer in Evidence

Mr. Bradford: I offer in evidence Exhibit No. 26.
Exam. Dahan: Exhibit No. 26 will be received in evidence. The witness is excused.

(Applicant's Exhibit No. 26, Witness Schaller, was received in evidence.)

(Witness excused.)

Exam. Dahan: We'll recess until 1:45.

(Whereupon, at 12:30 p.m. the hearing was recessed until 1:45 p.m. of the same day.)

[fol. 453] AFTERNOON SESSION

Exam. Dahan: Come to order please. Are you ready to proceed, Mr. Murphy?

Mr. Murphy: I'd like to call Mr. Harron.

RAY V. HARRON was sworn and testified as follows:

Direct examination.

Mr. Murphy: Your Honor, before Mr. Harron begins to testify, could we mark the three exhibits for identification?

Exam. Dahan: Very well.

Mr. Murphy: The first one is a ten page exhibit and shows on the title page—

Exam. Dahan: It will be marked for identification as Exhibit 27.

Mr. Murphy: The next is a nine page exhibit.

Exam. Dahan: That will be marked Exhibit 28.

Mr. Murphy: The next is a three page exhibit.

Exam. Dahan: That will be marked as Exhibit 29.

(Applicant's Exhibits Nos. 27, 28 and 29, Witness Harron, were marked for identification.)

By Mr. Murphy:

Q. Will you state your name and give your business connection and describe your position.

A. My name is Ray V. Harron, I am employed by General Foods Corporation, White Plains, New York and have [fol. 454] been employed by them for the past nineteen years in various capacities in the general traffic department. My present position is that of General Traffic Manager.

Q. Mr. Harron, have you prepared a statement for presentation in this proceeding?

A. Yes, sir, I have.

Q. Will you proceed with that statement?

A. Prior to joining General Foods I had experience in the Accounting, Commerce, Operating and Traffic Departments of the Illinois Central and New York Central Railroads. Included in the responsibilities of the Traffic Department is the staff function of cooperating with the Purchasing

Department in assisting them to obtain raw materials on a competitive basis, transportation-wise, as well as with the Sales Department in developing markets for finished products.

It is in the course of this responsibility that we are here supporting the railroads' publication of a five and a half cent proportional rate on Corn from Illinois stations west of Kankakee on the Kankakee Belt Line of the New York Central to Kankakee.

The points which I intend to cover in my testimony are:

1. That during the first eight months of 1957, when the five and a half cent rate was effective, we purchased and had shipped to Kankakee 1,101 cars of corn from these sta-
[fol. 455] tions. That the average loading was 110,076 pounds; average revenue per car was $66.07; weighted average haul was 39.21 miles; weighted average car mile earnings was 168.5 cents.

2. That the billing on these inbound cars was applied to shipments of milled corn products to destinations located at Western Termini of Trunk Line or east thereof. That for the period January through August, 1957 we shipped 1,228 cars at proportional rate from Kankakee. That average weight was 81,775 pounds, average revenue per car $403.44 and average car mile earnings 47.70 cents.

3. That the total revenue per car and car mile earnings for the distances from these origins to final destinations at combination of five and a half cent proportional rate to Kankakee, plus proportional rates beyond were based on average weight, 81,775 pounds; average revenue per car, $448.42 with average car mile earnings 50.69 cents. My first exhibit, No. 27 for identification, which was prepared under my supervision shows the actual number of cars of corn from these Kankakee Belt stations unloaded by us at Kankakee for the period January through August, 1957.

While the exhibit is self-explanatory, we should like to explain that the origins are grouped according to a common intrastate rate to Kankakee. Now the exhibit is made
[fol. 456] out for months and a good way to explain it would be to take page two for example where we show the group

A origins from which the intrastate rate from Kankakee is twenty-two and a half cents a hundredweight and then we just went along and grouped the other points by that common rate from those origins to Kankakee.

Charges on this intrastate rate are collected on the initial movement to Kankakee. The individual distances to Kankakee from each origin within a group were totaled and averaged, and those individual distances by the way are shown on page ten of the exhibit. When the distance is used to determine car mile earnings, we have used a "weighted average" i.e. the actual number of cars from each group was considered in determining an over-all average distance, as explained on Page ten in connection with single asterisk reference.

After milling-in-transit and reshipment of corn products, the inbound charges are readjusted to five and a half cent per hundredweight on the net weight, after deduction of shrinkage or manufacturing loss. As to shrinkage or manufacturing loss, the full local intrastate rate paid initially applies and reflects a slight increase in inbound revenue. This is inherent in a milling operation and is a standard practice throughout the United States.

For example, on page two of the exhibit, from the Group [fol. 457] A origins there was a shrinkage loss of 528,148 pounds on which charges were based at twenty-two and a half cents per hundredweight. The balance of the inbound gross weight or 11,050,772 pounds, is available for transit at the proportional rate of five and a half cents per hundredweight to Kankakee.

Referring again to page two, from Origin Group A the average earnings per car are $69.20, including the amount applicable to shrink, and this reflects per car mile earnings of a dollar four and a half cents. It also shows that from these Group A origins the average inbound weight per car amounted to 110,275 pounds.

It will then be observed that we have shown the totals which are pertinent to these figures and below that we have shown averages. Those bearing asterisk marks are the weighted averages considering total number of cars from each origin group, which means that the volume of traffic has been considered as between the different origin groups.

For example we have treated the distance of 66.2 miles from origin Group A as related to 105 cars, origin group B is considered in relationship to 21 cars from that group and so forth. In essence page two shows that we unloaded 230 cars in the month of January 1957 which paid the railroads an average earning of $67.23 per car and car mile earnings of 148.2 cents.

[fol. 458] Q. Mr. Harron, $67.23, was that per car earnings?

A. No, that's per car revenue and a dollar 482 per car mile earnings. The succeeding pages three through nine shows the same information for the months of February through August 1957.

Page one is a recapitulation for the total eight month period and shows that a total of 1,101 cars moved to Kankakee at a weighted average total of 39.21 miles, that the average weight per inbound car was 110,076 pounds and produced average revenue per car of $66.07 and weighted average per car mile earnings of 168.5 cents.

My next exhibit shows the actual—there, Mr. Examiner, I had to change a word. Page nine on Exhibit 28, the second line after X, the word distance should read "destination". This exhibit shows the actual outbound shipments of grain products from Kankakee, Illinois to the east on which the inbound rate was reduced to the five and a half cent proportional rate. The rates applied on outbound movements are proportional rates from Kankakee, Illinois to destinations shown, and it will be observed those destinations are shown by states.

As shown on page seven, the total number of cars shipped during the period January through August 1957 is 1,228, and the average weight of such cars has been used to develop revenue per car and per car mile earnings outbound [fol. 459] from Kankakee, reflecting the distances via the principal routes used to these destinations.

Route numbers and tariff authorities for distances appear on page eight.

The outbound revenue is coupled with the inbound revenue on the same weight reshipped from Kankakee to final destination, following milling-in-transit, under provisions of Agent Hinsch's Tariff 413-T, ICC 4652.

Car mile earnings, both out of Kankakee and the combined inbound and outbound revenue are weighted averages, i.e. the number of cars to each destination was multiplied by the distances applicable to such destinations and such total distance was divided by total number of cars. Such weighted average distance was then used to determine the car mile earnings. Thus the exhibit shows, page seven, that 1,228 cars were shipped at an average weight of 81,775 pounds; that the average per car outbound revenue from Kankakee was $403.44 and the average per car mile earnings was 47.70¢.

Further that when coupled up with the inbound revenue, the total revenue per car and car mile earnings for the through distances from these Kankakee Belt origins to final destination, at combination of the five and a half cent proportional rate to Kankakee, plus proportional rates beyond, were $448.42 average revenue per car and the average per car mile earnings were 50.69¢.

[fol. 460] All rates include X-206 increase which became effective December 28, 1956. Under present day rates which include the X-206A increase of nine percent effective August 26, 1957; to Trunk Line and New England destinations shown here the rates would be two cents per hundredweight higher than the rates shown in our exhibit. Considering this two cents per hundredweight increase now in effect, outbound earnings per car on the same tonnage would be $419.80 with per car mile earnings of 49.64 cents.

Mr. Examiner, taking into account this additional two cents per hundredweight increase, the combined inbound and outbound charges per car become $464.78 and the per car mile revenue is then 52.4 cents on the weighted average totals.

Before I refer to the next exhibit 29, I'd like to make some corrections on it. On the first page show the truck distance Union Hill to Morris, change the figure from 28 to 36. The total of that column would then be 151.1. In the third column change 128.5 to 116.5 and the last column the circuity, change 880.1 to 797.6. I have one similar correction on the second page, that is from Priscilla to LaSalle, where we show nineteen miles, change that to eleven; the total then from 173.3 to 165.3. In the third

column change excess mileage from 104.7 to 96.7 and then the last column, circuity change from 152.6 to 140.9.

[fol. 461] This exhibit 29 shows the wasteful transportation involved in the movement of corn from typical Kankakee Belt stations on the New York Central via truck to Illinois River landings, thence barge to Chicago and rail to Kankakee versus the movement from these origins direct via rail to Kankakee. On pages one and two of this exhibit we have listed representative origins situated on the Kankakee Belt of the New York Central Railroad and have shown the highway distances from these origins to the logical river port. To this distance we have added the number of miles to Chicago via Mechling Barge Lines and the New York Central Railroad distance from Chicago to Kankakee, thus producing a total distance from such origins via truck-barge to Chicago, plus additional rail distance to Kankakee.

Opposite such total distances we have shown the direct rail distance from each such origin to Kankakee. In the third column we show the excess mileage involved by the movement via Chicago versus direct movement to Kankakee. In the last column we have indicated the degree of circuity by percentage.

It will be observed that the truck-barge-rail distances range from 140.1 miles, that would be at Blair, to 171.3 miles while the direct rail mileages to Kankakee range from 14.6 miles to 73.4 miles. The excess mileage via [fol. 462] Chicago to Kankakee ranges from 96.7 to 117.1 miles, with range in circuity from 133 percent to 797.6 percent.

Q. Mr. Harron, referring to page three of this exhibit, do you have changes to make on that, similar to those you made on the first two pages?

A. Yes, the same changes I made on pages one and two should be made on page three of the exhibit.

Q. Will you state what changes should be made on page three?

A. The same changes should be made on page three as were made on pages one and two.

Q. From Union Hill to Morris on the map we show a distance of twenty-eight miles.

A. That should be changed to thirty-six miles.

Q. And from Priscilla to LaSalle you show a distance of nineteen miles.

A. That should be changed to eleven miles.

Q. Is that all the changes that should be made on page three?

A. That's all the changes that should be made.

Page three of this exhibit is a map showing the origins selected and the river landings, indicating the distances between such origins and river landings. When grain moves direct via the New York Central to Kankakee, our previous exhibits show that reshipping rate from Kankakee, which is [fol. 463] the same as that applying from Chicago, is plussed by five and a half cents per hundredweight inbound as contrasted with the movement and incidental expenses involved when we are forced to purchase from Chicago Terminal Elevators which moves from Chicago to Kankakee, a distance of some seventy-five miles. This moves at a billing rate of six and a half cents per hundredweight and, after milling at Kankakee, is reshipped east at the balance of the Chicago reshipping rate.

This concludes my direct testimony.

Mr. Murphy: The witness is available for cross examination, Your Honor.

Cross examination.

By Mr. Chartrand:

Q. Mr. Harron, on your exhibit 28, on page seven thereof, do I understand that the earnings per car mile for the total movement from origin to final destination is fifty plus?

A. Right.

Q. Fifty point sixty-nine cents. Now what is the minimum rate in connection with this five and a half cent rate?

A. The minimum rate into Kankakee?

Q. Yes.

A. A hundred thousand pounds.

Q. If a car weighing a hundred thousand pounds from Streator to a point in Vermont moved through direct, a hun-

[fol. 464] dred thousand pounds in and a hundred thousand pounds out, it would be the Kankakee combination of five and a half plus a hundred thousand on the proportional rate going to the east?

A. Plus the proportional rate from Kankakee.

Q. And you are not bound to the minimum hundred thousand pounds in connection with the proportional from Kankakee to the east?

A. No.

Q. Is there no restriction in so far as transit is concerned that applies to the highest in and out rate?

A. No, there isn't.

Q. Referring to your exhibit 29 you have taken the truck distance from Union Hill to Morris, nothing is shown here with regard to the truck distance with regard to Joliet or Lockport. Would it move that way?

A. I asked for routes by typical origin. I don't know whether this grain is trucked to Joliet or Lockport and I also noticed by the way, I think there was a substantial barge movement from Morris, Illinois indicated by Witness Tascik's exhibit. I don't know whether this grain is trucked to Joliet or Lockport.

Q. So you have not included any barge loading points north of Morris or south of Spring Valley?

A. That is true, I have not.

[fol. 465] Q. And in showing Union Hill, the truck distance from the New York Central shipping point of Union Hill to the barge loading point at the river, is that the way the competitive traffic moves?

A. First explain what you mean by competitive traffic.

Q. You are showing the circuity under the truck-barge-rail to Kankakee and then you are showing rail direct to Kankakee.

A. Right.

Q. Is that first total 151.1 miles, is that the competitive movement, the route via the competitive movement or the total mileage via the competitive movement?

A. That is of course you appreciate the excess mileage here that it takes if we buy corn at Chicago and we get X barge corn. If it comes from this territory; that's the purpose of this exhibit to show the circuity in that.

Q. Under the competitive conditions?

A. That's right. Now I have to take a short haul point with the long haul point, I have to average them out.

Mr. Chartrand: Yes. That's all. Thank you.

By Mr. Legg:

Q. Mr. Harron, in your exhibit 28, in computing revenues for shipments beyond Kankakee you have included only destinations in eastern territory?

A. That is true.

Q. And the reason you did that is that there were no [fol. 466] shipments in central territory up until the end of August 1957?

A. That is true.

Q. Under this rate. There might be shipments to central territory as the rate now stands, under the presently effective supplement?

A. Under the present effective supplement, the five and a half cent rate would apply to central territory. I don't know if it has ever been used or not, but when this exhibit was prepared, the only shipments that had been made were those to the destinations shown here.

Q. In computing the revenues you have included the revenues of connecting carriers as well as those of the New York Central Railroad, have you not?

A. Oh, yes, this is the revenue for the total distance hauled via the routes shown in this exhibit here, so that includes the revenue of all the carriers via those carriers, Mr. Legg. On page eight of this supplement there are shown the routes and that includes the revenue for those carriers shown.

Q. You have no information available to you which would allow you to compute the revenue to the New York Central alone on its share of the haul?

A. No divisional information available to the shippers.

Mr. Legg: I have no further questions.

[fol. 467] By Mr. Freeman:

Q. I just have one or two. What is the minimum weight out of Kankakee that is available in the five and a half cent rate?

A. Under the milling in transit shipments, the tariff rate throughout Official Territory including the movement from Kankakee is forty thousand pounds on all grain products and our average weight is 81,775.

Q. Just for the purpose of clarification, I want to understand just what your outbound weights, how you arrived at those outbound weights. Is the product shown on the bill exclusively Kankakee billing?

A. Say that again.

Q. Is the weight based out of Kankakee based exclusively on Kankakee billing?

A. You mean Kankakee billing, bulk billing from these west end shipments?

Q. Yes.

A. Yes, these are the shipments on which we apply the five and a half cents.

Q. And there is no mixing of bills?

A. Not on any of these shipments.

Q. I see. Now you gave one of your intrastate rates which would be applicable on the shrink grain. Have you shown those any place? I don't find them.

A. Oh, yes, it is shown on each page for each group, Mr. [fol. 468] Freeman. If you will take page two, I can go over that with you.

Q. I find it.

Mr. Murphy: Just answer the question.

By Mr. Freeman:

Q. Is the source of your inbound weights taken from the freight bills or the way bills?

A. Actual freight bills as we paid the charges.

Mr. Freeman: No further questions.

Redirect examination.

By Mr. Murphy:

Q. I have one question on redirect, Mr. Harron. Directing your attention to Exhibit No. 29 and referring to Mr. Chartrand's question, in your distances via the truck barge rail route are they intended to portray the fact that all of the corn moving via the barge rail route moves from those particular rail stations?

A. No.

Mr. Murphy: Thank you, that's all I have.

Mr. Chartrand: But, Mr. Harron, does it portray the route via which it would travel if the New York Central shipping point of Union Hill moved the corn via the competitive mode of transportation?

The Witness: If the grain moved from Union Hill to Morris, it would be a circuity of 797 percent.

Mr. Chartrand: That's all.

Exam. Dahan: Do you offer the exhibits?

[fol. 469] OFFERS IN EVIDENCE

Mr. Murphy: I offer Exhibits 27, 28 and 29 into evidence.

Exam. Dahan: If there is no objection, they will be received. You are excused, Mr. Harron.

(Applicant's Exhibits Nos. 27, 28, and 29, Witness Harron, were received in evidence.)

(Witness excused.)

Mr. Murphy: Your Honor, that completes our direct case.

Exam. Dahan: That complete Applicant's direct case. Are protestants ready to proceed?

Mr. Freeman: Yes, we are Your Honor.

Exam. Dahan: Let's have a five minute recess before we proceed.

(Short recess.)

Exam. Dahan: Come to order please.

Are you ready to proceed, Mr. Freeman?

Mr. Freeman: Yes. Before calling my first witness I'd like to introduce as an exhibit of counsel, Exhibit 700 in ICC Docket 31874, sometimes known as the Southern Grain Case, which exhibit was offered on behalf of the Central Territory Railroads which are the applicants in this proceeding.

Mr. Murphy: Your Honor, I object to the introduction of this exhibit into evidence on the grounds that George Javoronok, I am not too sure who he is other than what is [fol. 470] said in this statement, this is not a verified authenticated copy of what it purports to be and I have no opportunity to cross examine or establish whether or not what is said here would be in any way pertinent to the issues here. I think this thing of trying to lift part of a record of one case bodily out and put it in another case without there being any opportunity to see what cross examination went in in connection with this evidence, to see what explanation may be given in this evidence, is incompetent. I vigorously object to that way of making a record.

Mr. Freeman: This, if the Examiner pleases, is clearly admissible as an admission under the rules of evidence by one party in a case before the Commission in another case involving the same parties.

Mr. Murphy: But not the same litigation.

Mr. Freeman: I must apologize for not having a certified copy. I will in accordance with the rules of the Commission if the opposition insists have this copy certified by the Secretary of the Commission.

Mr. Murphy: This could not even come in as an admission because the same issues are not involved. I submit that picking a little portion of another record and bringing it in here without qualification or explanation, certainly doesn't give us an opportunity to inform this record how [fol. 471] it might be pertinent or how much weight it is entitled to.

Mr. Freeman: I may say for the record that this was offered by counsel Tolmey in the Southern Grain case on behalf of the Central Territory Railroads who were defendants in that case and that the New York Central was

a defendant in that case, just as they are an applicant in this case. The Central Territory were defendants in that case just as they are party applicants in this case, and it is clearly admissible as an admission.

Mr. Murphy: The issues and the nature of evidence that may be presented in that case are entirely different. I haven't seen this at all, but I do object.

Mr. Freeman: Mr. Leiper represented the New York Central in that case and he can speak for this exhibit.

Exam. Dahan: We'll mark it as Exhibit 30.

Mr. Murphy: Is there to be testimony in regard to this exhibit?

Mr. Freeman: Not by us. Now I would like to call Mr. McWilliams as the first witness on behalf of the Protestants.

(Protestant's Exhibit No. 30, Counsel Freeman, was marked for identification.)

JOHN C. MCWILLIAMS was sworn and testified as follows:

[fol. 472] Direct examination.

By Mr. Freeman:

Q. Will you state your full name and address?

A. John C. McWilliams, 859 Warner Building, Washington 4, D.C.

Q. In what profession are you engaged, Mr. McWilliams?

A. I am engaged as a transportation statistician and cost analyst.

Q. What experience or background have you had in this field?

A. My experience in the field covers a period of twenty-two years. I was employed for six and a half years in the Bureau of Transport Economics and Statistics of the Interstate Commerce Commission, and upon the creation of a Cost Finding Section within that Bureau I was assigned to the new section. My duties there included the drafting of formulas, for the analysis of the costs of various forms

of transportation, the application of such formulas and the analysis of costs and other statistical studies introduced before the Interstate Commerce Commission in cases before it.

Exam. Dahan: I want it understood I haven't received the Exhibit. I merely marked it for identification.

Mr. Freeman: May we have a ruling?

Exam. Dahan: Are you going to examine the witness in respect to this?

[fol. 473] Mr. Murphy: He was just offering it as counsel's exhibit.

OFFER IN EVIDENCE

Mr. Freeman: I was asking for it to be marked and I do offer it.

Mr. Murphy: He offered it as counsel's exhibit and I have objected.

Exam. Dahan: Under the rules of evidence records in other Commission proceedings where offered, the parties represented at the hearing must stipulate upon the record that portions or a portion may be incorporated by reference and that any other portion of that same proceeding that opposite party may want to have incorporated by reference may be received. Now of course it is subject to objection and if you can offer it as counsel's exhibit we have to know what it is in order to be able to rule on it. The fact that it is testimony that was presented in another hearing doesn't mean it has any relevancy in this case.

Mr. Freeman: I will be glad to make a statement with regard to its relevancy. Southern Grain Case is a case still in process which involves the level of rates from Western Trunk Line territory and Eastern Territory to the south from origins which include the states of Illinois and Indiana, include the transportation service indeed which is in issue here. It is a complaint proceeding brought by [fol. 474] the Southern Governors Conference and as I stated before the New York Central and other Central Territory Railroads are party defendants. This was a cost study offered by Witness Javoronok, who is an employee

of the Pennsylvania Railroad. It was offered however on behalf of all Central Territory Railroads.

Exam. Dahan: Including the applicant here?

Mr. Freeman: Including the applicant here. A number of special studies were made to examine the characteristics of the corn and other grain movements. Those special studies were participated in by the New York Central, the applicant here. Such studies included origin, weights, switching, including switching at Indianapolis, a study which was made by the way by the New York Central, carloadings, station clerical costs, special services including grain doors, loss and damage and so forth; a very complete study, cost study by these railroads of the service characteristics of moving grain from points which are here in issue.

Exam. Dahan: Do you have something to say?

Mr. Murphy: Yes, Your Honor. First the issues in that proceeding are different. There you had movements to the south, here we have movements to the east. Many of the defendants in that case are not parties to this case. The Plaintiffs to this case are not parties to that case. [fol. 475] Second, the destination territory is not the same. For another thing I don't know if there was cross examination of this particular witness named George Javoronok. I don't know anything about it other than I have something here that purports to be something said by George Javoronok and it doesn't even say where he said it or when he said it and I certainly object to the introduction in evidence of other records, partial records of other proceedings into this case.

Exam. Dahan: Does this embrace the complete transcript?

Mr. Freeman: Mr. Leiper can check my understanding of the matter which is that there was no cross examination of Mr. Javoronok. Am I correct, Mr. Leiper?

Mr. Leiper: I am not at all certain that I was present at any hearing in which this was entered in evidence. I have been in appearance at certain hearings in that proceeding. It escapes my memory as to whether or not I was present at this particular session.

Mr. Freeman: May I ask if the New York Central does have a transcript of this proceeding?

Mr. Leiper: No, it does not.

Mr. Freeman: Does the Central Territory here in Chicago have a transcript of this proceeding?

Mr. Leiper: I am not at all certain.

Mr. Freeman: I think if you check you'll find you do.

[fol. 476] Mr. Chartrand: We'll bring a copy of the transcript of this witness for examination or for discussion here if you so wish.

Mr. Murphy: I don't think that will do any good, just to show what page so and so said this. They are trying to extract a small portion of the evidence in that record and transpose it into this record and that is clearly inadmissible under the rules of evidence.

Mr. Freeman: May I give the transcript reference? It's pages 7659 through 7668. I must confess I am a little taken aback.

Exam. Dahan: Is there any other part of the transcript you'd like to have admitted?

Mr. Murphy: I don't know the record, Your Honor. It certainly puts us at a disadvantage.

Exam. Dahan: I am going to receive it in evidence. The objection is overruled.

(Protestant's Exhibit No. 30, Counsel Freeman, was received in evidence.)

Mr. Freeman: May we proceed, Mr. Examiner?

Exam. Dahan: Yes.

The Witness: For three years after leaving the Interstate Commerce Commission I was employed by the American Trucking Association, initially as director of research and later as chief economist. My principal duty there in-

[fol. 477] cluded a continuing analysis of both motor and rail costs. Since August 1945 I have been engaged in private practice preparing cost analysis of motor carrier costs, railroad costs, bus costs, and testified before this Commission on numerous occasions and before numerous state commissions.

By Mr. Freeman:

Q. Have you prepared two exhibits, Mr. McWilliams? A. I have.

Mr. Freeman: May we have them marked for identification please. One is entitled Summary of Service and Traffic Unit Costs, Box Cars.

Exam. Dahan: Number 31.

Mr. Freeman: And the other is Application of Costs at Current Levels to Corn Movements on the Kankakee Belt.

Exam. Dahan: Number 32.

(Protestant's Exhibits Nos. 31 and 32, Witness McWilliams, were marked for identification.)

By Mr. Freeman:

Q. Before explaining these exhibits, Mr. McWilliams, will you set forth the sources of the material which you have used in these exhibits? A. The sources are basically of two types. The figures for the eastern district are derived from Statement 1-57 of the Cost Finding Section of the Interstate Commerce Commission and those for the New York Central are the result of an application of [fol. 478] rail form A. The rail cost formula of the cost section to the figures for the New York Central. The cost statement 1-57 is the result of applying rail form A to the figures of the carriers in the eastern district as a group. This formula designated as Rail Form A was initially drafted for use in Docket 28300. I participated in the drafting of the original Formula and in the later revision of it I sat in with a consulting group as to the changes that were made in the formula. From the standpoint of principle, there have been no substantial changes in the formula since its initial drafting. Its function is to separate the expenses of railroad operation among the various elements of service performed, and to develop for those various elements of service unit costs which may be applied against traffic. Its primary use has been to test the compensativeness of segments of traffic.

The first Exhibit 31 is a summarization of those unit costs. The data on lines one to 21 refer to out of pocket

costs and on the succeeding lines to constant costs. In the application of rail form A, the out of pocket costs are considered to be eighty percent of operating expenses, rents and taxes other than income taxes, a return of four percent on the value of equipment and a return of two per cent on the value of other property. The use of those percentages [fol. 479] is to reflect that the return on equipment is one hundred percent out of pocket element and that the return on other property is fifty percent out of pocket. The constant costs include the remaining twenty percent of operating expenses, rents and taxes other than Federal Income Taxes, the deficits from passenger and less carload service, the return on the remaining freight value of property, of the remaining two percent and a return of four percent on property dedicated to passenger and less than carload service. As to income taxes themselves the income taxes related to the return treated as out of pocket is an out of pocket element of cost. The Federal Income Taxes related to that portion of the return treated as constant is a constant element of cost.

The first seven lines of Exhibit 31 set forth various elements of terminal cost for box cars, the first two elements, switching and freight train car expense, reflect on a territorial average a reloading at the spot of unloading on twenty percent of the cars. In other words those figures are one hundred eighty percent of a terminal handling. They are short of two full terminal handlings to that extent. The next item, station clerical is an amount per car as are the special services line six. I have shown on line eight the carload platform cost per ton, which is again a territorial average in the case of the east or a system average in [fol. 480] the case of New York Central, but have not used that particular element of cost in connection with my other Exhibit 32. I developed at lines 11 through 14 the out of pocket interchange costs for one carrier's service, and that is for a load or empty, but not both. Thus those figures if they were to be used to get a complete interchange cost between two carriers would be multiplied by four.

In the next group of entries I have shown as a result of the Form A application the cost per car mile which is uniform as to all three types of train and the gross ton mile

costs which vary as among the three types of car. Under the heading of constant cost I have shown the terminal cost per hundredweight, the interchange cost per hundredweight for one carrier's participation and the line haul portion of the constant cost per hundredweight mile. I might say in the car mile costs in lines sixteen, eighteen and twenty, I have eliminated any element of interchange switching cost in this broad use of the formula. The cost section in statement 1-57 includes interchange cost as being a variable factor with distance, but it does provide for eliminating that element and that is what I have done here. As to the levels of cost, statement 1-57 is based on the operations of the eastern district railroads for the year 1955 adjusted to the January 1, 1957 levels. The basis of [fol. 481] that adjustment was to obtain and this is the adjustment which is set forth in statement 1-57, was to obtain an index of cost levels at the date January 1, 1957 and to apply it to the operating expense portion of the costs, and that's what I have done here or shown here. The method which was followed.

By going to the work papers underlying statement 1-57 I was able to obtain the separate entries in columns three and four and column five was obtained by the Cost Section and can be obtained here with one exception which I will discuss by increasing the amount in column three by 11.2 percent and then adding to that the element of return on value from column four. Thus the adjustment to a later period did not contemplate or reflect any increase in the cost of return on value. The one exception to what I have said is in the constant cost per hundredweight at line 23, and per hundredweight mile at line 25. Those constant costs include among other things the deficit from passenger service and thus an 11.2 percent increase in operating expenses would mean an increase of a greater amount in the passenger deficit itself, and if you made the check you'd find that the increase in the constant cost, the operating expense portion, was about sixteen or seventeen percent rather than 11.2 percent. Again these are merely the figures which underly statement 1-57. The figures at the current [fol. 482] level for eastern district are based on an analysis of the cost increases claimed in Ex parte 212. The total

operating expenses, rents and taxes other than Federal Income Taxes for the year 1955 as shown in Statement 1-57 at page 91 were to the nearest million, 3,426,000,000 dollars. Analysis of the cost increases claimed in Ex parte 212 and by analysis of Witness Getty's Exhibit A in that proceeding, the cost increases over the January 1, 1957 level have been computed at 128,700,000 dollars, or an increase of three point seventy-five percent. I may have misspoken myself when I cited the figure of 3,426,000,000 from the statement 1-57. That was the volume of expenses for 1955 after adjustment to the January 1, 1957 level, so that the cost increase alleged in Ex parte 212 add another three point seventy-five percent to the annual volume of costs. So that the formula for getting column six of my exhibit 31 is to extract out of column five the return element shown in column four, apply three point seventy-five percent to that expense portion and then add back the return.

Now, in the case of the constant costs, that does not reflect the full impact of the cost increases for the reason I gave before. The same thing basically is true of the adjustments for the New York Central. The data for the year 1956 in column 7 and 8 are from my underlying work [fol. 483] papers of the application of Rail Form A to the New York Central figures. I analyzed their returns in Ex Parte 212 to the special questionnaire of the railroads and found that their net operating expenses, rents and taxes for the year 1956 excluding Federal Income taxes were $720,925,000, that the cost increases claimed by them in Ex Parte 212 on an annual basis amounted to $36,217,000. In addition to that there were material price increases beyond the 1956 level which had been set forth in the Ex Parte 206 proceedings which for the Eastern District including the Pocahontas region amounted to an additional one and a quarter percent increase in operating costs. That latter element, my reference on that is that the increase in material costs are set forth at the first mimeographed decision in Ex Parte 206 at Sheet 6. The annual volume of expenses are set forth in the second decision in Ex Parte 206, mimeographed decision at sheet 15. Those two elements totaled $45,373,000 of increase in cost levels over the year 1956 or an increase on an annual basis of six

point twenty nine percent in the cost of the New York Central exclusive of return on value and Federal Income Taxes so that to get column nine of Exhibit 31 I used a rounded off percentage of six percent applied to column 7, adding to that the return element in column eight. The six percent obviously should be a higher figure than the three [fol. 484] point seventy-five percent used for the Eastern Districts because the latter figure is merely a trending from January 1, 1957 to current cost levels, whereas the six percent used for the New York Central is to convert its cost for the average of the year 1956 to a current level.

By Mr. Freeman:

Q. Have you completed your explanation of Exhibit 31?

A. I believe so.

Q. Would you explain Exhibit 32 please.

A. Exhibit 32, I have set up in Exhibit 32 an application of costs based on Exhibit 31 to a fifty ton load and to a fifty-five ton load of movement on the Kankakee Belt. The hundredweight per car on line one are merely a conversion of tons to hundredweight. The tare tons per car at line two are taken from statement 1-57 reflecting the tare tons of box cars. The car miles at line 3 are based on the average distance of 46.4 miles which was furnished to me by counsel, and reflect also a one hundred percent empty return movement. The gross ton miles are computed by multiplying the tare tons of 24.1 by 92.8 miles and the tons of load, fifty or fifty-five as the case may be, by 46.4 miles.

The hundredweight miles at line five are arrived at by multiplying the hundredweight in line one by the distance of 46.4 miles. In items six through 16 I accumulate the [fol. 485] various elements of cost. The terminal cost at line six was obtained by using the first three items, that's lines two, three and four, of Exhibit 31, but increasing the switching and the freight train car element to reflect one hundred percent empty spotting of box cars instead of the eighty percent factor which is reflected in the figures in Exhibit 31. That was done by increasing those first two elements of cost by eleven percent and adding thereto the station clerical cost at line four without any adjustment.

The next item of special services cost was obtained by adding to the special services cost shown at line six of Exhibit 31, $11.36 as the cost of grain doors. I may say at the present time I am describing the development of columns two through five of Exhibit 32. The loss and damage clerical expense results from multiplying the unit cost from line nine of Exhibit 31 by the number of tons in the load, fifty or fifty-five as the case may be. Similarly loss and damage payments reflect the application to the fifty or fifty-five ton load of the unit cost per hundred pounds found in statement 1-57 at 1955 levels of .418 cents per hundred pounds. The car mile cost at line ten reflects the application of the car mile unit costs from line 18 of Exhibit 31 to the car miles loaded and empty, Item 3 of Exhibit 32. Similarly the gross ton mile costs in Exhibit 32 [fol. 486] result from applying the unit cost per gross ton mile from line 19 of Exhibit 31 to the gross ton miles, item 4 of Exhibit 32. These various elements added together developed the total out of pocket cost shown at line 12. The terminal constant costs were obtained by the multiplying the hundredweight from line one by the terminal constant cost per hundredweight from item 23 of Exhibit 31, and the line haul constant costs for line 14 of Exhibit 32 resulted from multiplying the hundredweight miles, Item 5 by the unit cost from Exhibit 31, line 25. Adding the total of the constant cost to the total of the out of pocket cost develops the fully distributed cost. Columns six, seven, eight and nine merely reflect dividing the costs per car developed in columns 2 through 5 by the applicable hundredweight for each load.

Q. Does that conclude your explanation of Exhibit 32?

A. Yes, sir.

Q. Will you define, Mr. McWilliams, as you understand it "out of pocket cost"?

A. Well, up to now I have given what elements are included in it. As to what the concept of it, it reflects those costs which over a sufficient period of time are influenced by the volume of traffic handled and which are in proportion to the volume of traffic handled.

Q. Sometimes referred to as—well, what are other terms [fol. 487] that are used?

A. Many terms, avoidable costs, marginal costs, direct costs, but as the term is used in rail form A and explanatory documents concerning rail form A, it basically is intended to include those costs which given a reasonable time lag will adjust themselves to volume of traffic.

Q. Those which vary with traffic?

A. That is correct.

Q. Does a showing of car mile earnings measure the compensatory level of a rate?

A. No, the car mile earnings taken by themselves do not afford a measurement of profitability. There are too many elements which affect costs for a car mile earning by itself to be meaningful. That is the basic reason why rail Form A was drafted in the first place. It was to give measurement to these factors which fall with different impact on different lengths of haul, different weight per car, number of interchanges involved, all of those are factors which produce differences in cost and none of which are reflected in a car miles earnings figure. When I say not reflected I mean not measured.

Q. Have you had an opportunity, Mr. McWilliams, to adjust your figure to take into account the different length of haul which has been discussed on this record by Witness Tasčik?

[fol. 488] A. Yes, I have.

Q. If so, will you give us those figures for the record?

A. Well, of course I can give you the end result. I don't imagine you want all the calculations.

Q. No, the end result and the assumption you made.

A. They can be made merely by restating items 3, 4, and 5 of Exhibit 32 to reflect the different lengths of haul, then to apply as I have outlined in my direct testimony the unit cost from Exhibit 31 to those revised statistics. Doing that and going to the end result, the effect of using a 38.3 mile loaded haul to which Witness Tasčik testified would change the entries at line 12 in the cost per hundred pounds column, in column six the figure of 9.66 would be reduced to 9.31. The figure for the New York Central would be reduced from 9.63 to 9.31 cents. In the next column the Eastern District figure would be reduced from 8.90 to 8.57 cents and in the last figure, New York Central

would be reduced from 8.87 to 8.56 cents. After these fully distributed costs in the last line, column six, the figure would be 13.24; column seven, 13.87; column 8, 12.50 and in column 9, 13.12. By the way, while I think of it, there is a minor typographical error in the Exhibit. Line 12, column 4, the figure presently reads 97.96 and it should be 97.90. That's purely a typographical error.

Q. The column on Exhibit 32, fifty and fifty-five tons, [fol. 489] reflect merely the difference in loading, Mr. McWilliams, the effect of the difference in loading?

A. That is correct, an increase in the loading per car reduced the out of pocket unit costs.

Mr. Freeman: The witness is tendered for cross examination.

Cross examination.

By Mr. Murphy:

Q. Mr. McWilliams, you indicate that car mile earnings have no validity for measuring the compensatory level of a rate. I ask you if there are factors other than costs that affect rates?

A. Very much so.

Q. What are those factors?

A. I can name them. There's a question of the value of service, what the traffic will bear, reasonable relationship of rates, all of the things provided for by the Act. I wasn't pretending to testify as an expert on those elements.

Q. You weren't intending that all rates should be fixed on a cost basis?

A. Not at all, sir. My testimony as to car mile earnings was that car mile earnings in and of themselves give no measurability or reflection of the relationship of revenues received to costs incurred.

Q. Are you familiar with what is known as the burden [fol. 490] study, a document or release prepared by the Commission's Bureau of Statistics and Economics?

A. Yes, I am.

Q. Is that the correct bureau?

A. No, that is released by the Cost Finding Section of the Bureau of Accounts, Cost Finding and valuations.

Q. Was this formula that you have referred to, Rail Form A, used in the preparation of the Burden Study?

A. Yes, it is.

Q. Have you reviewed that Burden Study from time to time as it is released by the Commission?

A. Yes, I have.

Q. Have you ever noted that there are substantial volumes of movement in certain commodity groups that move at rates that don't produce a revenue distribution over the out of pocket costs?

A. There are some, yes. Some factually do not make such distributions and in some cases it is because you have had a concentrated movement such as iron ore movements where the cost procedures haven't reflected the costs.

Q. You mean the costing procedures are not adequate to reflect true costs?

A. Not in connection with concentrated movements of tonnage of the iron ore traffic and heavy movements of coal, because of the fact that those studies have not been [fol. 491] made and the tendency in the Burden Study is to overstate the cost of handling coal and iron ore and conversely understate the cost of handling other products.

Q. But the Burden Study does show that using this formula that you have used some rates don't produce out of pocket costs?

A. That is correct, it does show that.

Q. Are there any agricultural commodities that don't produce out of pocket costs in the Burden Study?

A. I am trying to pick the place of reference. Do you want it for the United States or Official Territory?

Q. Any.

A. There are differences depending which way you look. The United States net total traffic figures which I am looking at—

Q. Pick just any agricultural commodity.

A. It shows lettuce, potatoes, not sweet, canteloupes, melons, fresh vegetables and celery as failing to contribute to the transportation burden in the year 1955.

Q. Now, Mr. McWilliams, were you with the Commission at the time that experiments were made to arrive at a cost formula for arriving at rail unit costs?

A. Was I with the Commission?

Q. Yes, when this form A was developed?

A. Yes, I participated in the original drafting of rail [fol. 492] Form A.

Q. What was the first case that was used in?

A. Docket 28300.

Q. What was the nature of that case?

A. That specific case was a general class rate investigation.

Q. And what was the issue in that case? Was it an issue of the relative levels of rates in various territories? Was it a territorial discrimination issue?

A. It was; the use of the formula in that case was to measure the differences and levels of costs among territories.

Q. And that was the purpose for which it was originally designed, to arrive at territorial unit costs?

A. That was the original purpose. Since then it has been used in many, many cases as a yardstick to set up a measure of comparison to test the compensatory nature of rates.

Q. Is there a pink book in front of you? Is there a caveat there about the use of these costs?

A. Yes, in the pink one, and in the carload cost scale publication itself.

Q. Would you mind reading that please?

A. Would you give me a reference, sir, to the one—

Q. You know it better than I do, I'm sure. I just have a [fol. 493] layman's recollection of it.

A. It is easier for me to find it here, sir, I can assure you they are consistent. The explanatory statement for 1-57 says the territorial figures, and these are the scales without any adjustment here, reflect the out of pocket cost for carload freight service under a wide range of operating conditions within each territory, including the type of car, the tare weight and percent of empty return movement, the net weight of load, the length of haul, and the types of train, whether they are way or through. Aside

from the factors listed the cost represents average operating conditions within each territory. Then in a later section of the same document reference is made to some of the adjustments which can be made if the specific circumstances of a particular movement vary from these standards. Is that the caveat you had in mind?

Q. Yes. In this formula it reflects the average costs reduced to a ton mile expense for the Eastern District Railroads, is that correct?

A. No, sir. Not at all. It reflects the, you made reference to the Eastern District Figures talking about those as distinct from the New York Central figures?

Q. That's right.

A. Those reflect not all costs reduced to a ton mile base, but measuring the various elements of cost that enter into [fol. 494] the transportation here involved. The transportation involved here is set forth in the first five lines of Exhibit 32. The unit costs for performing the various elements of service are in Exhibit 31, and then there is an application of the cost of performing various elements of service to the appropriate service units.

Q. To arrive at your average terminal cost for the Eastern District, would it be an average of the terminal costs of all eastern railroads which would include their terminal operation say at a port?

A. Yes, it would include operations of that type. It would include the operations of carriers like the Bessemer and Lake Erie, it would include the multiple car handling of coal by the coal originating roads in the Eastern District and the dumping of coal in large quantities with multiple car operation at ports and lakes and at the large users of coal.

Q. Would it include lighterage?

A. To a limited extent, yes. The total amount of lighterage service in the eastern district spread over all the cars handled in the eastern district results in a very small element of course.

Q. But that would be in there?

A. It would be in there, yes.

Q. Does it reflect cost of the New Haven Railroad?

[fol. 495] A. The Eastern figures do, yes.

Q. This terminal cost is based on an average number of switching minutes for originating a car for example?

A. Yes, it is.

Q. What is the average number of switching minutes per car in the east for example?

A. For the entire operation of the load, the empty, let's take them in chronological order, the empty and the load at origin, the load and the empty at destination on a hundred percent basis as I eventually adjusted my figures. In the eastern district that would include the total of sixty engine minutes per car.

Q. How many days would that car spend in as you have characterized it, a hundred percent empty return in both the origination and destination under the formula?

Exam. Dahan: I'll call a recess for a few minutes.

(Short recess.)

Exam. Dahan: Come to order.

By Mr. Murphy:

Q. I believe I had asked you how many car days were involved in the two terminals that you have priced out here?

A. Terminals alone?

Q. Yes.

A. Seven and a half days.

Q. Then you have allowed sixty minutes for the ter-
[fol. 496] minals, engine minutes for the switching at the two terminals?

A. Of the loaded and the empty, yes.

Q. Do you include any intra-train switching in your cost?

A. A very small amount, sir. I made a check on that and based on New York Central figures I had a dollar and sixty-one cents.

Q. A car?

A. A car. That's because it was put in on a car mile basis.

Q. How much effect does a car day in the terminal have on your cost?

A. You mean in terms of dollars and cents?

Q. Yes.

A. It will take just a moment.

Q. I just wanted to see you work that.

A. As used here about a dollar forty-six cents.

Q. Per car day?

A. About a dollar forty-six or forty-seven. I might explain how I got that. You have nine dollars, ninety two at line three, column nine of Exhibit 31. I increased that eleven percent to get my two full terminals and I divided that result by seven and a half days.

Q. Did you make any study of the operations in the Kankakee Belt?

A. No, sir. That type of study would purely be within [fol. 497] the province of the railroad.

Q. Have you ever been on the Kankakee Belt?

A. No, sir.

Q. Have you ever been to Kankakee?

A. No, sir.

Q. You've got a special service cost on here. What is included in the special service cost?

A. On Exhibit 32?

Q. Yes.

A. The principal element is the cost of grain doors which I mentioned at $11.36.

Q. Per car?

A. Per car.

Q. Do you know what the cost of paper grain doors is?

A. No, sir, I have heard a figure mentioned to me. It is completely hearsay. It is nothing I know.

Q. Well, if paper grain doors cost four dollars a door, would that effect a $7.35 change in your ultimate result?

A. If factually the cost of a grain door was four dollars instead of $11.36, yes.

Q. Is the cost of grain doors you priced out based on the wood grain doors?

A. Yes, it is based on $11.36 for a grain door.

Q. Is there a coopering cost in that cost for special services?

[fol. 498] A. Special services contains a composite of items, sir. I was trying to find as quickly as possible the language which would best describe it and quickest. Those

special services include expense for cleaning cars, removing dunnage, furnishing grain doors, bedding live stock, coopering cars, closing doors on hopper cars and so forth. That's spread over all traffic and as a result there is a dilution in doing it. You end up spreading much of the cost over mileage cars, tank cars, refrigerator cars, where these items do not apply, so there's a tendency for the special services cost to be understated.

Q. Do you have any cost for bedding live stock in the movement of grain?

A. You do not. That's what I meant by a dilution of cost. Basically you end up with a dilution of box car special services cost because these various items I listed are also spread over cars of refrigeration and tank cars where they do not apply.

Q. Do you end up with a price that may or may not be related to the type of movement involved?

A. You end up with a cost that tends to understate the cost on cars which do require special service because you have such a large volume of traffic against which such service does not apply.

Q. May or may not that be true when you use an average [fol. 499] that includes something like bedding live stock?

A. You end up with a cost that may not be an exact measurement of a particular service. The question then is whether that cost is too low or too high for the particular service rendered.

Q. Do I understand that you have a passenger deficit included in your cost?

A. Only in the constant cost, sir. The entries in Exhibit 31 through line 21 and Exhibit 32 through line 12 do not include any portion of the passenger deficit.

Q. Would the same thing be true in connection with the LCL deficit?

A. Yes, it is not contained in the out of pocket costs.

Mr. Murphy: Thank you. That's all I have.

Exam. Dahan: Is there any redirect?

Mr. Freeman: I just have one or two questions.

Redirect examination.

By Mr. Freeman:

Q. Have you had an opportunity to review the statement referred to as Exhibit No. 30?

A. Yes.

Mr. Murphy: Now I object to questions about something that some other witness said in another proceeding of this witness.

Mr. Freeman: I am merely going to ask him, and I think if you hear the question you'd find it unobjectionable, if [fol. 500] the statements on the first page of that exhibit referring to cost from statement 5-56 are based on Rail Form A.

The Witness: Yes. That was the statement previous to Statement 1-57 that was based on the year 1954 with cost adjusted to the January 1, 1956 level.

OFFERS IN EVIDENCE

Mr. Freeman: That's all. May exhibits 31 and 32 be received in evidence?

Exam. Dahan: If there are no objections Exhibits 31 and 32 are received. You may be excused.

(Protestant's Exhibits Nos. 31 and 32, Witness McWilliams, were received in evidence.)

(Witness excused.)

Mr. Freeman: I'd like to call as my next witness Mr. Wilson.

RONALD B. WILSON was sworn and testified as follows:

Direct examination.

By Mr. Freeman:

Q. Would you state your full name and address?

A. Ronald B. Wilson.

Q. By whom are you employed, Mr. Wilson?

A. The Indiana Farm Bureau Cooperative Association.

Q. In what position?

A. The grain division.

Q. What position do you hold with the Indiana Farm [fol. 501] Bureau Cooperative Association?

A. Assistant general manager of the grain division.

Q. How long have you been employed by the Indiana Farm Bureau Cooperative Association?

A. I started with the organization in July 1925.

Q. And what have your duties been in the period from 1925 to date?

A. Oh, I would say mostly freight traffic, buying and selling of grain.

Q. Prior to 1925 by whom were you employed?

A. Oh, I spent two or three years with the Central Inspection Weighing Bureau very shortly before that.

Q. Can you tell us briefly what kind of an organization Indiana Farm Bureau Cooperative Association is?

A. To state it briefly, I would state that they secure supplies and market their products in order to get the maximum benefit out of it, to be able to make their purchases as reasonable as possible and to get the maximum for the products which they have for sale.

Q. What kind of a corporation is it?

A. It is a corporation incorporated under the cooperative laws of the state of Indiana.

Q. Is it a Federated Cooperative?

A. Yes, it is.

Q. And what is its membership?

[fol. 502] A. Its membership, I believe the total membership in round figures is a hundred sixty thousand. They are broken down then I think in about eighty-six different associations, county associations and so on, cooperative associations and these various county associations and so forth often embrace, oh, one to several shipping points and receiving points.

Q. Are the members by and large farmers?

A. Yes.

Q. Farmers in Indiana?

A. Yes.

Q. What facilities has Indiana Grain Cooperative Association for handling grain?

A. We have five and a half million bushel house at Indianapolis and another elevator at Louisville of two and one half million bushel capacity.

Q. What volume of grain is handled by Indiana Farm Bureau Cooperative Association?

A. In recent years it has been running just about fifty million bushels per year.

Q. And what proportion roughly of that is corn?

A. I would say a good half of it to possibly just over.

Q. And to whom do you market the corn in the area and where is it marketed?

A. A large part of it is marketed I would say in what we [fol. 503] know here as Official Territory. However, some of it, a small amount goes into the south and it largely goes to various grain dealers, processors, distillers and so forth.

Q. Some of these people are located in the eastern part of the United States?

A. Yes, quite a number.

Q. Are you familiar generally with the issues in this proceeding?

A. I think so.

Q. Would you like to state the position of the Indiana Farm Bureau Cooperative Association on this record?

A. Yes. I have rough notes here that I think more or less portray the way the Indiana Farm Bureau Cooperative Association feels. I feel I am among friends here as we trade with both General Foods at Kankakee and the Evans Milling Company at Indianapolis. We also sell large amounts of grain at times in the Chicago market. We are members of both the Indianapolis Board of Trade and the Chicago Board of Trade. Our five and a half million bushel elevator at Indianapolis is located on the New York Central Railroad. However, we are very much opposed to the establishment of the low proportional rates to Kankakee which take the proportional rate from Kankakee when shipped beyond and which became effective on or about December 15, 1956. We would not in any way oppose such [fol. 504] reductions if they had been reduced proportionately from all intermediate points of origin to these eastern

destinations. No reductions were made from Indiana origins to the destination territory. Therefore this Illinois corn which is processed into products en route crosses the entire state of Indiana at a much lower, at much lower rates than it can be shipped from our Indiana origins to these same eastern destinations.

We have between a hundred and fifty and two hundred shipping points in Indiana to serve our grower members. Among these many shipping points for example are typical stations as Stockwell, Indiana, Clark's Hill, Indiana, Lebanon, Indiana, located on the New York Central. Corn from these points when milled in transit are rated sixty-nine and a half cents per hundredweight to New York and are wholly included in the movement provided for corn from the origins on the New York Central located on their Belt route west of Kankakee which are rated five and one half cents to Kankakee and fifty-four cents beyond, making a through rate of fifty-nine and one half cents to New York or ten cents a hundredweight less than our stations of Stockwell, Clark's Hill and Lebanon, although they are much farther removed from the destination territory and actually vibrate our elevators at Stockwell, Clark's Hill and Lebanon as these cars roar through those stations on [fol. 505] the same rails, following the same route in the same direction to the same destination territory. These typical stations used as examples are shown on the map furnished by Mr. J. R. Tascik and marked as Exhibit 1, in the lower right hand corner. Therefore, when we sell corn for milling in transit for our producer members from these representative stations, we can only net them ten cents a hundredweight less than if they were from the much more distant points located on the New York Central west of Kankakee, or we can state it another way; as all of us who are familiar with grain trading know that all markets are highly competitive and that when grain is sold in the eastern markets or basis the eastern freight rates all get about the same price on the same market. It is therefore readily discernible when we sell corn from the above mentioned three representative stations ten cents a hundredweight more freight has to be paid to reach these eastern markets than if the shipments were from those

stations on the New York Central west of Kankakee. History records that prior to the time an act to regulate interstate commerce was enacted, it was just such cases as this that brought about the enactment of the Act to regulate commerce. Then railroads set rates wholly—

Mr. Murphy: I object to what took place prior to 1887.

Mr. Freeman: Oh, I think his testimony is relevant [fol. 506] to this case. He is an intermediate shipper. He is telling you what he is opposed to in this case.

The Witness: I don't believe it will offend the record any when I relate it to this same instance. Maybe I'm wrong, but I think I am entitled to relate it.

Mr. Murphy: I have an objection pending.

The Witness: When rates were set wholly as they seen fit. Some undercut each other in many cases where two or three or more railroads served the same origin in an effort to get competitive or an advantage and held their rates much higher at the local intermediate points who had no choice of railroads to compensate for the much lower rates.

Mr. Murphy: I object to further testimony on this point, Your Honor. This historical narrative of what took place prior to 1887 is irrelevant.

Mr. Freeman: This man has lived with grain rates in the state of Indiana for a long period of time as he indicated by answers to questions with respect to his background.

Exam. Dahan: I will let him continue with his statement, but I want to confine the cross examination to the facts in the statement.

The Witness: To compensate for the much lower rates maintained at the competitive points. The only difference in this case apparently is that the carrier is cutting the [fol. 507] rates at certain points to get competitive with barge traffic rather than the traffic of another railroad. Mr. Tascik of the New York Central has stated that these reduced rates are compensatory. Assuming that to be true, then the Indiana intermediate points must be too high. If the reduced rates are not compensatory, then the much higher rates maintained at the intermediate points are compensating at least to some extent the loss incurred by the

much lower rates established to meet the low cost water transportation. In other words if these reduced rates are compensatory, then the much higher rates maintained at the intermediate points for the much shorter distances cannot be justified. The reduction of these rates from points on the NYC west of Kankakee without proportionate reductions from the intermediate points appears to us as contrary and repugnant to the principles establishing the act to regulate commerce requiring that charges for transportation shall be just, nondiscriminatory and equitable.

By Mr. Freeman:

Q. Does that conclude your statement of position?
A. Yes, it does.

Mr. Freeman: Witness is tendered for cross examination.

Exam. Dahan: I want the cross examination confined to statements of fact and not to any arguments or assumptions.

Mr. Murphy: I understand, sir.

[fol. 508] Cross examination.

By Mr. Murphy:

Q. Can you tell me what the basis of the rates from Indiana to the east is?
A. They vary.
Q. I don't mean the numerical basis, but the general way they are constructed?
A. The higher rates are from the west side of the state and they are graduated down to in the neighborhood of ten cents less from the extreme eastern side of the state on eastbound traffic.
Q. Are they on the Graham formula basis?
A. I am not familiar with the Graham formula. I have heard it so stated, but I do not know myself.

Mr. Freeman: You do not need to answer questions to which you cannot state facts.

By Mr. Murphy:

Q. Are you a traffic official of the Indiana Farm Bureau?
A. I used to be traffic manager for quite some years.

Exam. Dahan: He asked you are you now?

The Witness: Not directly within that, not wholly within that scope.

By Mr. Murphy:

Q. When were you traffic manager of the Indiana Farm Bureau?

A. I would say all the way through the 30's and most of the 40's until I'd say close to 1950, probably 1945 to '50.

[fol. 509] Q. Did you take part in a series of cases known as the Mechling cases?

A. No.

Q. Are you familiar with those cases?

A. Just in a meager way.

Q. Are you aware of the fact that corn can move through your territory on a, X barge corn on a reshipping rate of fifty-four cents?

A. Yes, I am.

Q. Are you aware of the fact that the barge rate from Lockport to Chicago is approximately three and a half cents?

A. No, I am not familiar with that.

Q. Well, you have seen some of Mr. Tascik's exhibits. Have you seen all of them?

A. No.

Q. Are you aware of the fact that the barge rail combination from Illinois River area through Indiana is lower than the local rate from Chicago?

A. No.

Q. You don't know anything about that?

A. No, I don't know that I have had occasion to look into that. I don't see wherein I have had any interest in that, at least it doesn't strike me that way at the moment. I am sure I am not familiar with that rate.

Q. Well, you were the traffic manager back in 1940?

[fol. 510] A. 1940, yes, I think that's correct.

Q. Weren't you aware of the fact that the barge rail combination through your territory in 1940 or shortly thereafter was lower than the local rates from your territory?

A. Well, for me to make a definite statement that I didn't know barge rates were lower, I probably couldn't state

that. I have always understood that barge rates were lower. We weren't too much concerned with it. We just marketed grain from our Indiana members.

Q. Are you in competition with Chicago at all?

A. I would think so. I would think that our marketing is in competition with all other markets more or less in the Official Territory. There's some that I might not need to be so closely in touch with, that's true.

Q. Well, assuming that the barge rail combination is lower than the local rates from your stations, would there be any change in the competitive situation if the railroads met the competition of the barge-rail rate?

A. I don't know. I'd have to give that some thought.

Q. You didn't examine any of those factors when you—

Mr. Freeman: Mr. Wilson said he's not familiar with the barge rates into Chicago or other costs incident to getting corn into Chicago, so your question doesn't have a proper foundation.

Mr. Murphy: I'll withdraw the question and ask another [fol. 511] one then, counsel.

By Mr. Murphy:

Q. You didn't have any factors other than the rail rates when you reached a decision as to what position you'd take in this case?

A. Now, wait a minute. I'm sorry, would you mind restating that again?

(Question read.)

The Witness: I think that I could say that that is true, that I didn't have any other particular factors.

Mr. Murphy: Thank you. That's all I have.

Mr. Freeman: I have nothing.

Exam. Dahan: You are excused, Mr. Wilson.

(Witness excused.)

Exam. Dahan: We'll recess until nine thirty Monday morning, Room 4, Lower Arcade, Board of Trade Building.

(Whereupon, at 4:30 p.m. the hearing was recessed until February 3, 1958 at 9:30 a.m.)

[fol. 512]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. F.S.A. No. 33955

In the Matter of:

CORN AND CORN PRODUCTS—
ILLINOIS TO OFFICIAL TERRITORY

Transcript of Hearing—Monday, February 3, 1958

Room B-4, Lower Level,
Board of Trade Building,
141 West Jackson Boulevard,
Chicago, Illinois.

Met, pursuant to adjournment, at 9:30 o'clock, a.m.

Before: George A. Dahan, Examiner.

Appearances: As heretofore noted.

ADDITIONAL APPEARANCES:

James C. Scott, 401 South Columbia Street, Dwight, Illinois, appearing for Scott Grain Company.

I. M. Funk, Kernan, Illinois, appearing for I. M. Funk & Son.

E. S. Herron, Gilman, Illinois, appearing for Illinois Grain Dealers' Association.

Ronald E. Tallyn, Wenona, Illinois, appearing for Wenona Grain Company.

[fol. 512a] Lawrence Farlow, 521 McGregor Street, Bloomington, Illinois, appearing for Farmers' Grain Dealers Association of Illinois, intervener as its interests may appear.

[fol. 514] PROCEEDINGS

Exam. Dahan: Mr. Freeman, are you ready to proceed?

Mr. Freeman: Yes, sir. I think Mr. Hayes wants to go forward with one of his witnesses.

Exam. Dahan: Are you ready to proceed?

Mr. Hayes: Yes.

Exam. Dahan: I just want to caution you. You will all have to speak loud while the air conditioning is going on so everyone will hear. Call your first witness, Mr. Hayes.

Mr. Hayes: Mr. F. A. Mechling.

F. A. MECHLING was sworn and testified as follows:

Direct examination.

By Mr. Hayes:

Q. Mr. Mechling, please state your full name and business address.

A. My name is F. A. Mechling. My business address is 51 North Des Plaines Street, Joliet, Illinois.

Q. What is your occupation and with whom are you associated?

A. I am executive vice president and treasurer of A. L. Mechling Barge Lines, Inc.

Q. How long have you been associated with A. L. Mechling Barge Lines, Inc. and in what capacity?

A. I have been with A. L. Mechling Barge Lines, Inc. [fol. 515] and its predecessor proprietorship, A. L. Mechling, doing business as A. L. Mechling Barge Line, since 1939, when I became its bookkeeper, dispatcher and office manager. In 1942, I became general manager of the proprietorship, and in 1947 I became vice president and treasurer of the corporation, continuing as general manager. In 1956, I became executive vice president.

Q. What are your duties as executive vice president?

A. I have general supervision of the entire operation and of the corporation, including its accounting.

Q. What is the nature of the operations of A. L. Mechling Barge Lines, Inc.?

A. A. L. Mechling Barge Lines, Inc. is a common carrier by water licensed by the Interstate Commerce Commission to carry, among other commodities, grain in Interstate Commerce to and from points on the Illinois Waterway and the Mississippi River and by the Illinois Commerce Commission to carry corn in intrastate commerce. It also is certified by the Interstate Commerce Commission to carry other commodities to and from points on the Upper Mississippi River and the Illinois Waterway to and from Tampa, Florida, as well as being certificated for certain other transportation. The company now operates 125 barges and 14 towboats of modern type and construction. It operates a sea-going tug of 1,000 horsepower in service [fol. 516] involving gulf passages which is certificated by the U. S. Coast Guard and the American Bureau of Shipping for gulf service. The power of its several towboats ranges from 325 to 2,500 horsepower. This company hauls more grain to Chicago than any other water carrier. Its share of the total water traffic in grain to Chicago ranges between 60 per cent and 75 per cent from year to year. It usually derives about 20 per cent of its total revenues from the Chicago grain trade and transportation of corn usually accounts for somewhat more than 60 per cent of the total of Mechling's revenues from its Chicago grain trade.

Q. Referring to your company, sir, as "Mechling," does Mechling carry corn from ports on the Illinois River between Spring Valley and Lockport to Chicago, Illinois?

A. It does.

Q. What are its present rates for such transportation?

A. It charges the rates set forth in our current tariffs on file. These rates are as follows: from Spring Valley to Chicago, $1.04 per net ton; from LaSalle to Chicago, $1.04 per net ton; from Ottawa to Chicago, 99 cents per net ton; from Seneca to Chicago, 44 cents per net ton—42 cents per net ton; from Morris to Chicago, 88 cents per net ton; from Joliet to Chicago, 78 cents per net ton; and from Lockport to Chicago, 73 cents per net ton.

[fol. 517] Q. How do these rates compare with rates on corn to Chicago charged in previous years by Mechling from this area?

A. Well, representative rates, for example, on March 1 of 1941, our rate from Morris to Chicago was 2 cents per

hundredweight, and our rate from LaSalle to Chicago was 2¾ cents per hundredweight.

On October 22, 1946 the rate from Morris to Chicago was 2½ cents per hundredweight, and from LaSalle to Chicago, 3¾ cents per hundredweight. Effective on October 31, 1949 our rate from Morris to Chicago was 3¾ cents per hundredweight, and from LaSalle, 4 cents per hundredweight to Chicago. On December 6, 1957 our rate from Morris to Chicago was 4.4 cents per hundredweight, and from LaSalle to Chicago, 5.2 cents per hundredweight.

Q. Do you oppose the Fourth Section Application made by the railroads in this proceeding?

A. I do.

Q. What effect did the New York Central's promulgation on December 15, 1956 of the rate for which this application seeks Fourth Section relief have on shipments of corn carried to Chicago, Illinois by A. L. Mechling Barge Lines, Inc. from Illinois River ports in the area near the Kankakee Belt Line?

[fol. 518] A. It substantially reduced the amount of corn shipped to Chicago from these ports via Mechling. During the period from December 15, 1956 to August 28, 1957, when the New York Central's rate was enjoined, the amount of corn carried by Mechling from these ports to Chicago was less than it had been in the same period one year previously, even though the 1956 corn harvest in this area was substantially larger than the 1955 corn harvest had been.

Q. That injunction became effective on August 28, 1957. That was your intention.

A. Yes.

Q. Have you prepared or caused to be prepared under your direction and supervision, an exhibit showing the amount of corn hauled by Mechling from these ports to Chicago in these two periods of time?

A. I have.

Mr. Hayes: Mr. Examiner, we should like to have the exhibit to which the witness has just referred numbered consecutively as the next number, which I am informed is 33.

Exam. Dahan: Yes. But please identify the exhibits, and I will have them marked for identification. We would like to have them identified for the record.

Mr. Hayes: The exhibit to which I refer is entitled [fol. 519] "Corn shipments via A. L. Mechling Barge Lines, Inc. and Marine Transit Company to Chicago, Illinois."

Exam. Dahan: That may be marked for identification as Exhibit Number 33.

(Protestant's Exhibit No. 33, Witness Mechling, was marked for identification.)

By Mr. Hayes:

Q. I show you the exhibit which has just been identified for the record and which is entitled "Corn shipments via A. L. Mechling Barge Lines, Inc. and Marine Transit Company to Chicago, Illinois from Lockport, Morris, Seneca, Ottawa, LaSalle, and Spring Valley, Illinois, during the periods December 15, 1955 to August 28, 1956 and December 15, 1956 to August 28, 1957." Is this the exhibit to which you refer, which has just been numbered 33?

A. It is.

Q. Will you please explain this exhibit?

A. This exhibit shows the amount of corn in tons of 2,000 pounds carried by A. L. Mechling Barge Lines, Inc. and its wholly owned subsidiary, Marine Transit Company, during the periods specified from the river ports specified to Chicago. Marine Transit Company, although wholly owned by Mechling, was operated by Mechling as a separate company during these periods until April 27, 1957. As you can see from an examination of the exhibit, [fol. 520] there was a substantial reduction amounting to 50,503.43 net tons of corn carried by Mechling and Marine Transit in the period during which the New York Central's reduced rate on corn was in effect as compared to the period a year earlier. Two of the figures in this exhibit differ from those presented in my affidavit in the recent suit in the District Court of the United States for the Northern District of Illinois, No. 57 C 1450, entitled "A. L. Mechling Barge Lines, Inc., et al. versus United States of America, et al.," in that the number of tons carried from

Spring Valley to Chicago during the period December 15, 1955 to August 28, 1956 is 13,801.16 tons rather than 9,490.71 tons, as stated in that affidavit, and the amount carried from LaSalle to Chicago during the period December 15, 1956 to August 28, 1957 is 29,305.34 tons rather than 29,929.53 tons, as stated in that affidavit. These two errors in the compilation of these figures were discovered after my affidavit was presented and have been corrected for this exhibit. They increased the total decline in corn shipped during the later period from the earlier period by 4,934.64 tons.

Q. How much is the total decline in bushels of corn?

A. Since corn weighs 56 pounds per bushel, a decline of 50,503.43 net tons would equal 1,803,694 bushels. This decline occurred despite the fact that the corn crop in this [fol. 521] area was larger in 1956 than it had been in 1955, and we normally would have expected to have carried more corn in 1956-1957 than we had in 1955-1956. As will be seen later, the amount of corn and other grains which we carried from other areas to Chicago in 1957 was substantially more than the amount carried in 1956.

Q. Why did you not include the ports of Lacon, Henry, and Hennepin in your exhibit?

A. For several reasons. First all three of these ports in the past have been situated on about the dividing line between the territory selling to the corn markets at Memphis or New Orleans and the territory selling to the Chicago corn market. The comparative market conditions at Memphis, New Orleans, or Chicago have determined whether these elevators would send their corn north to Chicago or south to Memphis or New Orleans. Thus the great majority of the corn from all three of these ports went south in the earlier period shown on my exhibit and north in the later period. This fact alone made the use of these ports inappropriate in an exhibit designed to show the effect of the New York Central's rates on our Chicago corn trade from this crea. Furthermore, it has been our experience in the past that corn moves south from Lacon, Henry, and Hennepin much more often than it moves north. In Lacon and Hennepin the situation may change because [fol. 522] the Illinois Grain Corporation, which has one of the two elevators both at Hennepin, and at Lacon, in June,

1957, opened its new elevator at Calumet Harbor in Chicago and therefore may tend to send more grain to it rather than to the south. I do not know how much influence this development may have. When the price of corn at Memphis or New Orleans is appreciably higher than it is at Chicago, I would expect the corn still to go south from these ports. I must add that I do not think it approprate to include Lockport in this comparison, and I have done so only because both General Foods and the New York Central requested information regarding it in the recent court case. At Lockport our tonnage moved to Chicago has declined in 1957, at least in part, because Glidden has opened a river elevator there and we do not receive as large a proportion of its corn for shipment as we do from Cargill's elevator at Lockport.

Q. Why have you made no comparison for any later portions of 1956 and 1957?

A. Because the New York Central's 5½ cent rate was not in effect during September, October or November 1957. Thus during only the first 15 days of December was there any difference between 1956 and 1957. This period was too short to be significant. Furthermore the corn harvest in 1957 was delayed by wet weather whereas the 1956 harvest [fol. 523] proceeded normally. Thus any comparison of periods during the harvest seasons of 1956 and 1957 would be misleading.

Q. What was the effect of this decline upon the efficiency with which Mechling was able to use its barges during the first half of 1957?

A. During the period December 15, 1955 through June 30, 1956, the number of the barges of A. L. Mechling Barge Lines, Inc. assigned to service of grain movements from these six river ports to Chicago, Illinois, averaged ten barges of 40,000 bushel capacity and eight barges of 30,000 bushel capacity. The number of barge days in use during this period was 1,325 for barges of 40,000 bushel capacity and 1,231 for barges of 30,000 bushel capacity. The number of idle barge days during this period was 420 for barges of 40,000 bushel capacity and 318 for barges of 30,000 bushel capacity. During the period from December 15, 1956 through June 30, 1957, the number of barges assigned to this service averaged nine of 40,000 bushel capacity and

eight of 30,000 bushel capacity. The number of barge days in use during this later period was 895 for barges of 40,000 bushel capacity and 1,040 for barges of 30,000 bushel capacity, and the number of idle barge days during this period was 773 barges of 40,000 bushel capacity and 504 [fol. 524] for barges of 30,000 bushel capacity. These figures do not include data for Marine Transit Company for those periods up to its merger into A. L. Mechling Barge Lines, Inc. because such data is not readily available for Marine Transit Company during these periods, but from my conduct of the operations of Marine Transit during these periods, I believe that if such data were available it would also show that the number of barge days in use declined and the number of idle barge days increased from the earlier to the later of these periods up to the time Marine Transit Company ceased to exist. Furthermore, the number of idle barge days of both companies would have been even greater had not A. L. Mechling Barge Lines, Inc. been able to divert some barges from the hauling of grain from these six river ports to other cargo movements. Such diversions, however, are not always possible or economical since grain barges used on the Illinois River economical since grain barges used on the Illinois River are smaller than those used for longer hauls and in other ways are not adapted for use on longer hauls.

Q. Did you have the same increase in idle barge time during the last half of 1957?

A. No. Beginning early in July more wheat was shipped by water to Chicago from Illinois Waterway ports than ordinarily is shipped, and in October we carried a substantially larger volume of soy beans than we have in the [fol. 525] past. The New York Central also did not have its low rate on corn in effect on the Kankakee Belt during September, October, and November 1957, because the rate was temporarily enjoined on August 28, 1957.

Q. Have you made a study or have you had a study made under your direction and supervision of the cost to Mechling of carrying corn and other grains to Chicago, Illinois from ports on the Illinois Waterway?

A. I have had a study made from our books and records kept in the regular course of business of the cost to A. L.

Mechling Barge Lines, Inc. of hauling all grains to Chicago from Illinois Waterway ports. It was not possible from our books and records to make a direct study for corn alone. Since the result of my study, however, is a unit cost per ton-mile, I believe that the study will enable me to approximate very closely the cost per ton-mile of carrying corn from the Illinois river ports between Spring Valley and Lockport to Chicago. Two factors tend to cause differences between costs per ton-mile for carrying grain from all Illinois Waterway ports to Chicago and costs per ton-mile for carrying corn from the Illinois River ports between Spring Valley and Lockport to Chicago. The first is that the costs for all grains include the costs for oats. Since oats weigh only 32 pounds per bushel as compared to 56 pounds per [fol. 525a] bushel for corn and rye and 60 pounds for wheat and soy beans, oats are a substantially lighter loading grain than the others. Therefore the costs per ton-mile are higher for oats than for the other grains for which the unit costs are substantially the same. On the other hand the average haul for all grains from all Illinois Waterway ports to Chicago tends to be somewhat longer than the average haul for corn from Illinois river ports between Spring Valley and Lockport to Chicago. This longer haul tends to decrease the ton-mile costs. Thus these two factors tend to balance each other out, but the effect of the longer haul [fol. 526] will be more significant than the effect of the cost. For this reason I will introduce a correction when I use the results of my study in the computation of costs of transporting corn to Chicago from these six river ports.

Q. Have you prepared an exhibit showing the results of your study of ton-mile costs of carrying all grains from Illinois Waterway ports to Chicago to which you have referred?

A. I have.

Mr. Murphy: Your Honor, I am going to object to the manner of going into evidence of Mechling's costs. I don't know that Mechling's costs are under investigation in this case. This is a case involving the lawfulness of rail rates, not the lawfulness of barge rates.

Mr. Hayes: Well, Mr. Examiner, so far as relative costs are concerned, that is of the essence under the stat-

ute, of the relationship which should prevail between competing types of carriers.

Exam. Dahan: We will mark the exhibit for identification. That is the exhibit headed "A. L. Mechling Barge Lines, Inc. operating cost." That will be marked Exhibit 34, when the exhibit if offered in evidence, you may make your objection.

Mr. Murphy: I am objecting to questions directed to [fol. 527] that point on the grounds that they are irrelevant.

Exam. Dahan: The objection is overruled.

(Protestant's Exhibit No. 34, Witness Mechling, was marked for identification.)

By Mr. Hayes:

Q. I show you Exhibit Number 34 consisting of three pages, which has just been marked for identification and which is entitled "A. L. Mechling Barge Lines, Inc. Ton-mile Operating Cost of Transportation of Grain from Illinois Waterway Elevators to Chicago." Is this the exhibit to which you referred now marked Exhibit 34?

A. It is.

Q. Will you please explain this exhibit?

A. Page 1 of this exhibit shows the computation of Mechling's ton-mile operating costs of transporting grain in the Chicago grain trade from Illinois Waterway elevators. For 1956, the average operating cost per ton-mile was 9.196 mills, and for the first eleven months of 1957 was 8.546 mills. The information for making these computations is derived from pages 2 and 3 of this exhibit.

Page 2 of this exhibit shows the total of Mechling's operating expenses—that is, all expenses except interest and federal income taxes—allocated to the transportation of grain by barge to Chicago from Illinois Waterway elevators. As you will see, the left column shows the results [fol. 528] for the entire year 1956, while for comparison purposes the right column shows expenses for the first 11 months of 1957. The expenses for the full year 1957 are not yet available.

These expenses are broken down into three major classes of costs: (1) the cost of operating boats controlled

by us, which is shown on page 2 as Direct Boat Expense; (2) the cost of operating barges controlled by us, which is shown on page 2 as Direct Barge Expense; and (3) the cost of securing outside assistance, which is shown on page 2 as Other Expenses. Other Expenses also includes damage to property of others and cargo insurance.

Direct Boat Expenses include repairs not covered by insurance; fuel and lubricants; food, stores and supplies; laundry; wages including payroll taxes and group insurance premiums; hull and protection and indemnity insurance; depreciation or rent; radar, radio and telephone expense; transportation of crew members; injuries to employees; bonuses; and administrative charges which will be discussed later. All of these expenses except administrative charges are charged directly to the boats, and the expenses for each boat are accumulated at the end of each month to arrive at a total of direct expenses for each boat within these classifications. Administrative charges in- [fol. 529] clude: (1) wages of all executives, departmental heads and office and clerical help, including payroll taxes, insurance premiums, travel expenses and the expense of company furnished automobiles; (2) legal, accounting, traffic and advertising expense; (3) general office expense including machinery and supplies; (4) building expense including depreciation and insurance; (5) other routine expense; and (6) interest. You will note, however, that in the exhibit interest has been deducted from the total direct boat expenses. Administrative costs are apportioned to each boat on the basis of one share for each boat having less than 1,000 horsepower, and two shares for each boat of 1,000 horsepower or more. Since the boats are the sources of our income and the larger boats can produce more income than the smaller boats, we have thought it reasonable to allocate administrative expenses to the boats. The allocation of 2 shares and one share is made because our boats of over 1,000 horsepower on the average have a little more than twice the horsepower of those under 1,000 horsepower and so tow about twice the pay load.

Total boat expenses are allocated among the different types of traffic transported by the boat in a month on the basis of the number of hours worked by each boat in each

particular trade classification. The Chicago grain trade [fol. 530] is one of these trade classifications. When a boat is used in the operation of more than one trade classification, an allocation of the time in each trade is made on our books, and the costs are allocated proportionately. For example, if a boat has two barges of grain destined for Chicago and two barges of sand in tow at midnight, and does not change the tow during the following 24 hours, 12 hours of the boat's time would be charged to the Chicago grain and 12 hours would be charged to the sand trade. If, however, the two barges of sand had been tied off at noon and the boat had continued on until the following midnight with the two grain barges, 18 hours would be charged to the Chicago grain trade, and 6 hours would be charged to sand, and the day's expenses of the boat would then be allocated three-fourths to Chicago and one-fourth to the sand trade. Daily analyses of the time use of each boat are kept and at the end of each month the hours for each trade are totalled and the percentage of time in each trade is determined. If a boat is laid up for an extensive period this lay-up then is allotted to the various trades in proportion to their shares of active time of the boat for that year.

Direct barge expenses are such that they may all be allocated to each barge directly. Each month the allocation [fol. 531] of barge expenses to the various trades is based on the number of days in any particular service. If the barge is used entirely in one trade, 100 per cent of its costs is charged to that trade. If it is used in one trade 20 days and another for 10 days, then 67 per cent of its monthly expense is charged to the first trade, and 33 per cent to the second. In such a case idle time following time in use would be charged to the same trade to which the time in use was charged. Extended lay-up periods are apportioned to trades on the basis of the proportions of the remaining time of the barge during the year allotted to the trades. If expense is incurred on a barge for the particular trade, this expense is charged directly to that trade before allocating the remaining expense of the barge in proportion to the number of days used in the various trades.

Other expenses include primarily the cost of securing outside assistance during peak periods when it becomes necessary to obtain towing assistance from other barge lines to move our barges. If a boat operated by another company moves one of our barges from one port to another for us, the expense is charged to outside towing. If the assistance is rendered within the confines of one port or harbor the expense is charged to harbor work or port ex-
[fol. 532] pense. These expenses are charged to the trade to which the barge requiring the assistance is assigned at the time it receives assistance. Similarly cargo insurance and damage to property can be directly charged to trades, cargo insurance according to the type of cargo which is being insured, and damage to property according to the type of cargo being carried by the barge at the time the damage is inflicted. Both these last two items are very small, of course.

Page 3 of Exhibit Number 34 shows the number of tons of grain transported by barge to Chicago from Illinois Waterway elevators during the year 1956 and the first eleven months of 1957, the number of miles from each port to Chicago, and the total ton-miles hauled. Division of the total ton-miles shown on page 3 as 56,323,834 for all grains carried to Chicago into the total operating expenses, amounting to $517,979.58 as shown on page 2, for the year 1956 gives the average operating cost per ton mile for moving grain to Chicago from Illinois Waterway elevators during the year 1956. This amounts to 9.196 mills per ton-mile for the year 1956, as is shown on page 1. For the first 11 months of 1957 the total ton-miles amounted to 89,394,138, and the total expenses from page 2 amount to $763,951.80, making an average cost per ton-mile of 8,546 mills.

[fol. 533] Q. What was the reason for the decrease in ton-mile cost from 9.196 mills in 1956 to 8.546 mills in 1957?

A. The principal reason is the increase in volume of grain carried from Illinois Waterway ports to Chicago in 1957 over 1956. We have not had any appreciable increase in cost levels in 1957 over 1956, and our expenses therefore, although they have increased because of the additional work done, have not increased in direct proportion

to the increase in a number of ton-miles. In most of the areas along the Illinois Waterway grain moved in greater volume in 1957 than it did in 1956. Almost the only exception to that increase was the decrease in corn movements from the river ports between Spring Valley and Lockport to Chicago. The increase of volume of grain carried to Chicago has enabled us to use our equipment more efficiently since it does not cost materially more for a boat to tow four barges than it costs to tow two barges. Conversely any substantial reduction in the volume of grain hauled would result in a substantial increase in the cost per ton-mile of hauling that grain by reducing the efficiency of our transportation. If a substantial portion of the corn [fol. 534] traffic is diverted from river transportation to rail transportation, it will at least in part deprive the river transportation of its inherent low cost advantage over other modes of transportation with respect to the grain trade.

Q. Have you prepared an exhibit showing the computation of Mechling's average cost per ton for hauling corn from Spring Valley, LaSalle, Ottawa, Seneca, Morris, and Lockport to Chicago?

A. I have.

Mr. Hayes: I show you an exhibit entitled "Average Cost Per Ton of Transporting Corn from Spring Valley," and so forth for the year 1956. May that be marked Exhibit 35?

Exam. Dahan: It may be so marked for identification.

(Protestant's Exhibit No. 35, Witness Mechling, was marked for identification.)

By Mr. Hayes:

Q. I show you an exhibit which has just been identified as Exhibit Number 35, and which is entitled "Average Cost Per Ton of Transporting Corn from Spring Valley, LaSalle, Ottawa, Seneca, Morris and Lockport to Chicago." Is this the exhibit to which you refer?

A. It is.

Q. Please explain this exhibit.

[fol. 535] A. First I show the computation of the weighted average mileage per haul from the same six river ports, Morris, Lockport, Seneca, Ottawa, LaSalle, and Spring Valley to Chicago, for which the comparative corn shipments were shown in our earlier Exhibit Number 33. This shows that the total ton-miles of corn carried from these ports to Chicago in 1956 amounted to 36,941,918. The total number of tons amounted to 478,910.40, and the weighted average mileage per haul, computed by dividing 36,941,918 by 478,910.40, was 77.14 miles. Although we have not made a computation for the year 1957 of the weighted average length of this haul, I would not expect it to be substantially different from such length for 1956.

Q. Why did you not make the computation for 1957 of the weighted average length of haul?

A. We are not going to use the figure for 1957 to compute the cost per ton of transporting corn in 1957, because other figures for 1957 necessary for this computation are not available. We computed ton-mile costs on all grains for 1957 only as a check on the reasonableness of the cost computed for 1956 to see whether it were too low.

Q. Will you explain the computation in Exhibit Number 35 of the average cost to Mechling of hauling corn to Chicago from the six river ports, Seneca, Morris, LaSalle, [fol. 536] Lockport, Ottawa, and Spring Valley?

A. I applied the average operating cost per ton-mile for hauling grain from all Illinois Waterway elevators to Chicago to the weighted average mileage per haul from these six ports to Chicago. As I explained before, the ton-mile costs of hauling grain to Chicago from all Illinois Waterway elevators will closely approximate the ton-mile cost of hauling corn from these six river ports to Chicago. If the ton-mile operating cost computed for 1956 of 9.196 mills is multiplied by the weighted average mileage from the six ports to Chicago of 77.14 miles, the average operating cost per ton of hauled corn from the six ports to Chicago will be found to be 70.94 cents per ton. This cost, however, does not include any amount for return on investment or interest. To obtain a fully distributed cost which includes provision for these items in the same ratio realized from Mechling's business as a whole, we have divided the ton-mile cost by the ratio of Mechling's total expense, excluding

interest and federal income taxes to its gross operating income in 1956. This ratio for 1956 was 91.9 per cent, computed by dividing $5,014,237, our waterline operating revenues, into $4,606,023, our waterline operating expenses and waterline tax accruals. The figures for waterline op- [fol. 537] erating revenues and waterline operating expenses are as shown in our annual report for 1956. Mechling's ratio for 1957 is not yet available for application to 1957 ton-mile costs. The operating ratio of 91.9 per cent is also very close to the operating ratio of other similar barge carriers in the year 1956. For instance the operating ratio of Federal Barge Lines for 1956 computed in the same way was 91.0 per cent and for Blue Stack Towing Company was 88.2 per cent. If Mechling's operating ratio of 91.9 per cent is divided into the ton-mile cost of 9.196 mills for the year 1956, the resulting fully distributed cost is 1 cent per ton-mile. Multiplying the weighted average length of haul for corn from the six river ports to Chicago, I obtain the fully distributed cost for the average haul, amounting to 77.14 cents per ton, or 3.86 cents per hundredweight.

If this figure were to be corrected for increase in ton-mile cost caused by the lesser weighted average length of haul for corn transported to Chicago from the six named river ports, as compared to the weighted average length of haul for all grain from Illinois Waterway elevators to Chicago, the maximum increase in ton-mile costs would be about 14.0 per cent. The weighted average length of haul for all grain in 1956, computed by dividing total tons of 638,090 into [fol. 538] total ton-miles of 56,323,834, as shown on page 3 of Exhibit Number 34, was 88.27 miles. This figure is 14 per cent greater than the average haul for corn of 77.14 miles. Thus even assuming ton-mile costs decreased directly in proportion to the increase in the length of haul, which they cannot do since there is some additional expense for the additional mileage, the maximum increase in ton-mile costs for the shorter haul for corn would be 14 per cent. If the ton-mile costs on Exhibit Number 34 were increased by 14 per cent, the fully distributed average ton-mile cost would be 11.40 mills and the fully distributed cost on the weighted average haul for corn from the six river

ports would be 87.94 cents per ton, or 4.4 cents per hundredweight. This maximum cost was computed without taking any account of the effect of the lighter-loading oats on the ton-mile costs of transporting all grains.

Q. Are the exhibits you have spoken of, Mr. Mechling, now numbered 33, 34, and 35, true and correct according to the best of your knowledge and belief?

A. Yes.

Mr. Hayes: Cross examine.

Exam. Dahan: Mr. Murphy?

Mr. Murphy: Yes.

[fol. 539] Cross examination.

By Mr. Murphy:

Q. Mr. Mechling, you indicated on page 6 of your prepared testimony that your tonnage at Lockport declined because of the Glidden elevator there and the Glidden elevator in Chicago, is that correct?

A. Yes.

Q. You don't attribute any of the decline at Lockport to any factor other than that.

A. No. We think Lockport is a little far removed geographically from this general rate picture and from the New York Central Line in particular. We don't think there was any other effect on Lockport other than that Glidden elevator.

Q. Are you familiar with the total barge shipments from Lockport to Chicago during the periods that you have indicated on your exhibit, your Exhibit Number 33?

A. I am only familiar with the tonnages that we moved or that our subsidiary, Marine Transit Company, moved.

Q. Have you had an opportunity to see Exhibit Number 19 in this proceeding, which was submitted by Witness Tascik?

A. I have had the opportunity. I haven't really studied it.

Q. Did you note that the figures that he produced for the six ports and for the periods that you used are approxi-

[fol. 540] mately the same as the figures that you used?

A. That is exhibit—

Q. Exhibit 19.

A. On his Exhibit 19 he included ports of Hennepin, Henry, and Lacon, which we did not show in our exhibit.

Q. Directing your attention just to the ports that you used, for the period December 15 to August 28, 1956, as compared with his figures for December 15, 1955 to August 30, 1956, for the ports that you used, are not his figures and your figures very close?

A. Well, if my arithmetic is anywhere near correct, when I sat in the hearing room the other day, there is about 50,000 tons difference between those two figures.

Q. I ask you this, is it not a fact that the figures that he reported for the period December 15, 1955 to August 30, 1956 from Lockport to Chicago are very close to the figures that you report?

Mr. Hayes: I object to that. The witness has answered the question. If the figures are the same, the record will show it. The witness has said according to his arithmetic there is 50,000 tons difference.

Exam. Dahan: I think he may want to change his answer, though.

The Witness: You are comparing now in column 1 the Lockport figure of 42,759 tons compared to our figure [fol. 541] from Lockport in that same period of 39,653. Are those the figures you are comparing?

By Mr. Murphy:

Q. Yes. There is two days' difference in the periods you used, but isn't it a fact that your figures and his figures, in so far as you reported common figures, are approximately the same?

A. Well, that is true, I think primarily because the Glidden elevator didn't go into operation during that full period, came into operation at a later date, so that the only elevator shipping from Lockport at that time, during that period, basically, was the Cargill elevator. If you refer to the later column 2 figures, you will see that Lockport showed, in Mr. Tascik's exhibit, a shipment of 55,478 tons compared to our column 2 December 15, 1956 to August 28, 1957 figure of 16,726 tons, and that is the point that I

was referring to which reflects the addition of the Glidden elevator at Lockport on our tonnage.

Q. Isn't it a fact that the movement from Lockport to Chicago during the 1957 period was greater than the movement to Chicago during the 1956 period?

A. Yes, and I stated, I thought, Lockport being so far geographically removed from the New York Central-Kan- [fol. 542] kakee Belt Line in this case shows that Lockport was not so materially affected by that 5½ cent rate, and we only included the Lockport figures in our exhibits because it was requested of us in the District Court proceedings.

Q. Do you have any figures to compare the 1955-1956 period movements to Chicago by Mechling Barge Lines with the comparable movement in 1957, all origin ports to Chicago by Mechling Barge Lines on corn?

A. From all origin points?

Q. From Illinois River points?

A. From all Illinois River ports to Chicago?

Mr. Hayes: Do you mean all the way down the river to Grafton?

Mr. Murphy: He can give me the figures he has and explain what they mean and take it from there.

Mr. Hayes: I only want to know what you mean by your question.

By Mr. Murphy:

Q. I would be satisfied with the figures from Lacon to Chicago via Mechling Barge Lines for the 1956-1957 period.

A. Lacon to Chicago?

Q. Yes.

A. The period December 15, 1955 to August 28, 1956 on corn from Lacon to Chicago, we transported 11,225.58 tons. [fol. 543] Q. I am sure I didn't make myself clear. I would like the total movement from the ports Lacon and north to Chicago for that period.

A. Then your ports would be Lacon, Henry, and Hennepin.

Q. And Joliet, in addition to those that you have reported.

A. I have the figures for Lacon, Henry, and Hennepin. I don't have Joliet.

Q. Could you give them to me for Lacon, Henry, and Hennepin?

A. All right. Lacon, Henry, and Hennepin to Chicago for the period December 15, 1955 to August 28, 1956, was 24,596 tons. In the comparable period, December 15, 1956 to August 28, 1957, the tonnage was 75,522 tons.

Now, as I stated in my testimony—

Exam. Dahan: You have answered the question.

The Witness: I would like to qualify.

Exam. Dahan: You have counsel here, and he will ask on redirect if you want any other answers given. We want to go right along. He asked him for the figures, and he gave the figures.

By Mr. Murphy:

Q. Did you indicate that from the three ports for the 1957 period the total movement was 24,000 to Chicago?

A. That is correct.

[fol. 544] Q. There was a 50,000 ton increase from those three ports to Chicago during that year.

A. Yes; yes, sir.

Q. Your total corn movement to Chicago from Illinois River ports during the first eight months of 1957, was it greater or less than during the 1956 period?

A. That is on corn from all ports?

Q. Take the ten ports, sir, Lacon north.

A. Well, computing the drop-off from the points between Lockport and Spring Valley, the drop in tonnage, and adding the pickup in tonnage at Lacon, Henry, and Hennepin, those tonnages would be about the same.

Q. Which would be the higher, if you can tell us?

A. Offhand, they would be just about the same, 322,179 in 1956 and, roughly, around 321,000 would be the later period, 1957 period.

Q. I note from your Exhibit Number 34, page 3, that the total tons handled by A. L. Mechling Barge Lines, Inc. during 1957 exceeded the tonnage in 1956, is that correct?

A. Yes.

Q. And that the total ton miles also increased.

A. Yes, that is correct.

Q. How do you relate that increase—first an increase in corn tonnage, an increase in total tonnage, and an increase in total ton miles, to an increase in idle barge days?

[fol. 545] A. The barge fleet assigned to this particular area of the Lacon to Lockport section of the river was larger than necessary in the later period and had to be diverted to other uses.

Q. Did you have a larger fleet assigned there during 1957 than in 1956?

A. Not necessarily. We dropped some of the barges out of the section between Lockport and Spring Valley and utilized some of that capacity in other services, as I stated in my testimony.

Q. As a matter of fact, considering only your corn movement from ports Lacon and north to Chicago, your ton miles were substantially higher in 1957 than in 1956, weren't they?

A. Let me see if I understand. Would you read that again, please?

(Question read.)

The Witness: Yes, the ton mileage was greater because we are originating at longer distances and different traffic than we were moving in 1956.

Mr. Hayes: He asked you about corn.

By Mr. Murphy:

Q. Was your answer directed to corn, sir?

A. Well, you are speaking of the corn movement from [fol. 546] Lacon north.

Q. Yes, sir.

A. And that the ton mile was greater in 1957.

Q. I am asking you if that was a fact.

A. That is correct.

Q. Mr. Mechling, you gave him figures but didn't give any figures that indicate profit, and I am not going to ask you for the precise amount of profit—although I assume that is available in reports filed with the Commission

—but can you tell me whether or not your profits for 1957 were higher or lower than for 1956?

A. We haven't broken them all down yet, so I am just not able to answer that question right at the moment.

Q. You know your total net, don't you, without referring to any specific operation?

A. Over-all they are about the same, our total operation.

Q. Do I understand correctly that you increased your rates last month to the amounts that you read into the record, approximately .2 of a cent a hundred pounds or 4 cents a ton?

A. They were increased on December—

Q. The date is not—

A. They were increased by 4 per cent over the previous rate.

[fol. 547] Mr. Hayes: That was the last increase you referred to in your direct testimony?

The Witness: Yes.

By Mr. Murphy:

Q. Was that increase made because of your operating costs justified or required an increase in your rate structure?

A. Yes.

Q. You testified in regard to the larger corn crop in 1956 than in 1955, and I understand it is the 1956 corn crop that moved during the year 1957, is that correct?

A. Yes.

Q. Do you know whether more or less corn was placed in storage in 1957 under a government program than was placed in storage in 1956 under government program?

A. I don't know.

Q. To the extent that there could have been a substantial variance, that could have offset the increase in production, couldn't it?

A. You mean what went into storage?

Q. Yes. If there was a substantial variance in the amount going into storage, that could have offset an increase in production, could it not?

A. I don't see how it could affect production.

Q. You indicate that there was more corn available because of increased production.

[fol. 548] A. Well, if it was raised, it either went into storage or the free market, and it would still be the same number of bushels of corn, would it not?

Q. But if it was raised and a substantially greater amount went into storage in 1957 then the preceding year, there would be that much corn available for movement into the area, wouldn't there?

A. Will you read that.

(Question read.)

The Witness: I don't think I can answer that question. I don't know as it necessarily, just because that happened, it would affect the available corn to move by river.

By Mr. Murphy:

Q. You said you don't have the figures from Joliet with you, is that correct?

A. No, I don't.

Q. Isn't that an important port for Mechling Barge Lines on the Illinois Waterways?

A. Yes, there is a substantial movement from Joliet, but Joliet again is a little bit removed from this location of the New York Central-Kankakee Belt Line.

Q. Do you have any objection to furnishing the figures for Joliet as you have furnished them for the other six ports?

A. No.

[fol. 549] Q. I would appreciate receiving that sometime before the hearing is over if counsel has no objection.

Mr. Hayes: We don't have them here, counsel. Do you want them supplied to the record?

Mr. Murphy: I would very much appreciate it if you could. That is on corn, of course.

Mr. Hayes: We can supply those eventually—not today, but we will be here tomorrow. Perhaps it would serve your purpose to ask for the relative amounts in 1956 and 1957.

Mr. Murphy: No, I think the actual amounts, so it would correspond with the other figures shown on his exhibit, sir.

Mr. Hayes: All right. You say so it will correspond to the figures on the exhibits.

Mr. Murphy: Exhibit 33.

Mr. Hayes: You will notice Joliet is not there, for the reason, as the witness explained, it is too far distant from this territory—

Mr. Murphy: I understand Lockport is farther north of the New York Central than is Joliet, Mr. Hayes, so Joliet would be closer to the railroad than Lockport.

Mr. Hayes: By seven miles?

Exam. Dahan: We don't have to go into a conversation between counsel here.

[fol. 550] Are you all through with the examination?

Mr. Murphy: Just a moment.

By Mr. Murphy:

Q. You indicated on page 16 of your testimony, in discussing your statistics, that the average haul of 77.14 miles in 1956 wouldn't change substantially. Is it your position then that the decrease in tonnage shown from Lockport, Morris, Ottawa, and LaSalle and the increase in the tonnage from more distant ports, such as Hennepin, Henry, and Lacon, are insubstantial?

A. That's right; it wouldn't affect them substantially.

Q. It would increase them, would it?

A. I don't think it would affect them very substantially in either direction.

Q. It would have to be an increase, wouldn't it, sir?

A. It would be very hard to measure. It would be so slight.

Q. Well, if you have a weighted average figure and you take off the low figures and add on higher figures, would it increase or decrease?

Mr. Hayes: I submit that question is not susceptible of an answer, you increase your miles and increase your tonnage applied to those miles, that may—

Mr. Murphy: I have a question pending.

Exam. Dahan: We will find out if he is able to answer it.

[fol. 551] The Witness: It would be hard to answer that because in the case here there might be other grains come into the picture that may leave it about on the same basis; there would be no change, so far as the weighted average haul is concerned.

By Mr. Murphy:

Q. This weighted average haul of 77.14 miles, is that on all grains or is that on corn?

A. That is on all grains.

Mr. Murphy: I have nothing further.

Redirect examination.

By Mr. Hayes:

Q. I think you misspoke yourself perhaps in the answer to your—in answer to the last question. Would you look at your Exhibit 35? Do you find that figure, line 8, of Exhibit 35, that figure of 77.14 miles?

A. Yes.

Q. You have entitled your exhibit "Average Cost Per Ton of Transporting Corn," and so forth.

A. Yes.

Q. In that figure of 77.14 miles would be the weighted average mileage on corn and not on all grains, would it not?

Mr. Murphy: Are you correcting your witness, sir?

The Witness: Yes, that is correct.

[fol. 552] Mr. Hayes: Nothing further.

Exam. Dahan: Exhibits 33, 34, and 35, do you have any objection?

Mr. Murphy: Yes, your Honor. I object to Exhibits 34 and 35 on the grounds that that is immaterial to the issues of whether or not rail rates are lawful, barge costs. I object to their admission in evidence.

Offers in Evidence

Exam. Dahan: Exhibits 33, 34, and 35 are received in evidence.

(Exhibits 33, 34, and 35, Witness Mechling, were received in evidence.)

Exam. Dahan: You are excused.

(Witness excused.)

Exam. Dahan: Call your next witness, please.

Mr. Freeman: I think the Chicago Board of Trade, together with Mechling and Cargill have several country elevator witnesses who would like to go forward, and I think Mr. Roy Erickson is ready to proceed.

Mr. Erickson: If the examiner please, several of my witnesses aren't here; due to the fact that the Santa Fe Railroad was late and is still late there are one or two not yet here, but we can go forward with the witnesses we have, and we would like also at this time to enter appearances, separate appearances for these witnesses, and I shall appear for them as well.

[fol. 553] Exam. Dahan: It won't be necessary to read them all in the record as long as they are shown on the appearance slips.

Mr. Erickson: These gentlemen are all eligible to appear, being either owners or partners or direct employees of the firm.

Exam. Dahan: Very well. You mean the individuals are making appearances on their own behalf.

Mr. Erickson: On their own behalf, as well as my appearance.

Exam. Dahan: Then each one of those individuals will have to stand up, give his name and address and also indicate whether or not he has been admitted to practice, and if he hasn't to show whether or not he is an owner.

Mr. Erickson: Appearance slip for Mr. James C. Scott.

Mr. Scott: James C. Scott at Dwight, Illinois.

Mr. Erickson: You are a partner of the firm of J. C. Scott Company.

Mr. Scott: I am a partner of the firm of Scott Grain Company.

Mr. Erickson: And you appear on behalf of that firm only.

Mr. Scott: That's right.

Mr. Erickson: Mr. I. M. Funk.

[fol. 554] Mr. Funk: I. M. Funk of Kernan, with the firm of I. M. Funk & Son.

Mr. Erickson: Is that a corporation?

Mr. Funk: No, partnership.

Mr. Erickson: You are a partner of the firm.

Mr. Funk: That's right.

Mr. Erickson: Mr. Ronald Tallyn.

Mr. Tallyn: My name is Ronald E. Tallyn of Wenona Grain Company. I am a partner of that firm.

Mr. Erickson: Mr. Ed Herron.

Mr. Herron: I am Ed Herron, executive secretary of the Illinois Grain Dealers Association. I appear on behalf of the country grain elevator.

Mr. Erickson: I appear also for the Scott Grain Company, Dwight, Illinois; I. M. Funk & Sons, Grain Merchants, at Kenosha, Illinois; Wenona Grain Company, Wenona, Illinois; Grand Ridge Cooperative Grain & Supply Company of Grand Ridge, Illinois; and also for the Illinois Grain Dealers Association of Illinois.

I should like to call as my first witness Mr. James Scott of the Scott Grain Company.

Exam. Dahan: May I ask, are these witnesses all going to be called in order?

Mr. Erickson: Yes, sir.

Exam. Dahan: Will you have them all rise, and I will [fol. 555] swear them at this time.

(Witnesses sworn.)

James Scott was sworn and testified as follows:

Direct examination.

By Mr. Erickson:

Q. Will you please give your name, address, and the position in your firm?

A. My name is James Scott. My address is Dwight, Illinois, and I am a partner in the firm known as Scott Grain Company of the same address.

Q. Will you please give your experience in the grain elevator business?

A. Approximately six years.

Q. How long has the Scott Grain Company been located at Dwight, Illinois?

A. The Scott Grain Company as it is now known has been located at Dwight, Illinois for approximately six years. However, this business has been there for about 80 years.

Q. Who was the prior owner and operator of this Scott Grain Company?

A. We acquired the ownership of this property from R. A. McClelland Elevator Company.

Q. How long was that party operating this facility?

A. This particular man operated this facility for about 40 years.

[fol. 556] Q. What sort of facilities do you have for handling of grain via rail?

A. We have all the necessary equipment, including the scale, elevator, elevator equipment, and bins, all permanently located on the Gulf, Mobile, & Ohio Railroad tracks.

Q. What is the capacity of your track?

A. Of our elevator, sir?

Q. Yes.

A. Approximately 25,000 bushels.

Q. What is the capacity in number of cars that may be placed on your side track at one time?

A. It is almost virtually unlimited, but we can handle ten cars easily.

Q. How many could you load in a day?

A. Four to six a day.

Q. Where is your nearest competitor located on the New York Central Railroad?

A. Our nearest competitor on the New York Central Railroad is about three-quarters of a mile from our location.

Q. In what town?

A. In Dwight, Illinois.

Q. Would you please indicate on the map on the wall there where Dwight, Illinois is located?

Is that a point at which the Gulf, Mobile & Ohio Railroad [fol. 557] intersects the New York Central Railroad?

A. It is.

Q. Is there interchange of traffic between the Gulf, Mobile & Ohio Railroad and the New York Central Railroad?

A. Yes, there is.

Q. Does your competitor at Dwight, Illinois have the use of New York Central track facilities for the loading of grain?

A. Yes.

Q. Can he also use the facilities of the GM&O Railroad Company?

A. Yes.

Q. Is this in the same or in separate facilities?

A. Different facilities.

Q. Under one ownership and management.

A. Under one ownership.

Q. Have you ever made an attempt to be served by the New York Central Railroad as well as the GM&O?

A. I have.

Q. Were you successful?

A. No.

Q. What general area has your elevator served in these past years prior to the establishment of a 5½ cent rate on the New York Central Railroad?

A. A radius of five to six miles.

[fol. 558] Q. Would that be all north or all south or generally in all directions?

A. Generally in all directions with some variation.

Q. How was the production of corn in your general area in the years 1955, 1956, and 1957 in general?

A. They are classified as very good years.

Q. Was 1957 as good as 1956?

A. 1957 was, I believe, better than 1956.

Q. Now, what is your volume of business that you have handled during the years 1955 and forward? Can you give that for the record?

A. 1956 annual volume, approximately 276,000; 1956, 252,000.

Q. Pardon me. I believe you misspoke yourself. Was the first figure 1955?

A. 1955, yes. 1956, 252,000; 1957, 31,000; and as of Friday night of this year, nothing.

Q. Is that all free corn, or is that also so-called CCC or government corn?

A. None of this corn ever belonged to the government.

Q. Now, did you handle any corn for the government?

A. I did.

Q. What volumes did you have, say, in 1956 and 1957 of government corn?

A. Shipped for the government in 1956, 27,000; 1957, [fol. 559] 87,000.

Q. All that you have spoken about relates to actual shipments that have been made during those periods, is that correct?

A. Yes, sir.

Q. I take it that you are aware of the publication of a 5½ cent rate on the New York Central from Dwight, Illinois to Kankakee, Illinois?

A. Very much so.

Q. Do you have any other competitive points on the New York Central Railroad than Dwight, Illinois?

A. Yes. We have competitors both to the east and to the west.

Q. Do you have a competitor at Sunbury, Illinois?

A. We do.

Q. Was there a period of time in which the New York Central 5½ cent rate was not effective in the year 1957?

A. There was a short period, yes.

Q. Were you able to do any business during that period of time?

A. Yes, we were.

Q. Were you able to do any business prior to that time in 1957 as indicated by your volume?

A. None other than that.

[fol. 560] Q. Can you give us any illustrations of a loss of business to the Sunbury elevator?

A. Yes. I can cite two examples.

Q. Will you give that to us for the record, please?

A. Grain loss to Sunbury elevator, I have one crib, we will call it the Hanson crib, which we bought in 1955-56, lost in 1957. Another crib known as the Peterson-Reever crib, bought in 1955-56, lost in 1957.

Q. Were you present at the prior hearing in this proceeding held last week?

A. No, sir.

Q. If I were to tell you that a witness for Sunbury testified that he did not injure any competitor, would you consider that to be a correct or an incorrect statement?

A. I would have to consider it an incorrect statement.

Q. I would like to ask a few questions about prices. How are prices determined from you? Do you get them by bids?

A. Yes, sir.

Q. Who do you get your bids from the river?

A. We receive bids from Cargill, Inc., Continental Grain Company, Norris Grain Company, and the Glidden Company.

Q. At what location are these elevators?

A. Morris and Seneca.

[fol. 561] Q. What is your distance to the river?

A. Approximately 20 miles, to Morris.

Q. And what is your truck cost to the river?

A. From our house to the river, on corn, 3 cents a bushel plus tax.

Q. Now, are bids also given for New York Central track delivery?

A. Yes, sir.

Q. When a bid is given for New York Central track delivery, does that mean delivered in the car ready for shipment?

A. They will pay that price for the corn loaded in the car ready for shipment, right.

Q. Now, when you deliver from your house to the river, is that price based on the truck—at the truck dump at the river?

A. We can quote a farmer either way.

Q. I am talking from your facility to the river now.

A. It would have to be quoted as of our station.

Q. At your station.

A. At our station, less our expense, trucking expense.

Q. Less your expense to the river.

A. Yes.

Q. When you get this truck to the river is the river price there quoted in that truck, or does it require some further [fol. 562] handling? When you empty that truck, is that the price of your grain?

A. That is right. It must be loaded in their elevator, dumped in their elevator.

Q. Now I am going to the matter that you were just approaching, and that is, how is the settlement made with the farmer, first on grain which is shipped through your elevator or handled by your house, thence to the river? Is it made by the river house to the farmer?

A. No, sir.

Q. How is settlement made by the river house?

A. Settlement is made to us.

Q. And do you in turn settle with the farmer?

A. We do.

Q. And what factors are taken into consideration in that settlement?

A. Our commission for handling the grain.

Q. Is the river price taken into consideration first?

A. Yes.

Q. Is the transportation to the river taken into consideration?

A. Yes.

Q. And then your commission.

A. Right.

Q. And if the matter is handled entirely through your [fol. 563] house, then the settlement is made by you to the farmer.

A. That is right.

Q. Now, do you have occasions in which grain is transported direct from the farm to the river?

A. We have, yes.

Q. Who indicates what river house that shall go to?

A. We do.

Q. Who bears the expense of transportation from the farm to the river?

A. The farmer must ultimately bear the expense.

Q. Is it sometimes done by way of deduction from invoice settlement to him?

A. Yes, sir.

Q. Is that invoice settlement to him much in the same manner you previously described, through you?

A. Very much so.

Q. Now, if the present rate situation remains as it is now and this relief is granted so as to make this a permanent rate structure, what will it mean to you?

A. That is ruination, you might say.

Q. Will you be able to continue in operation there?

A. We have an investment of about $60,000 in this elevator property. It would be absolutely worthless.

Q. You have some other activities besides grain that are incidental, do you?

[fol. 564] A. Yes, sir; yes, we do.

Q. But the inability to handle this grain would cause you to cease operating there, is that correct?

A. I am afraid so.

Q. Did you protest to the Interstate Commerce Commission about this situation?

A. I did.

Q. Now, Mr. Scott, do you have any objection to a carrier, rail carrier, meeting a competitive transportation?

A. None whatsoever.

Q. Do you object to their going below a level which you understand to be necessary to meet this competition?

A. Absolutely not.

Q. You do not object to them going below that level.

A. I do object to them going below that level.

Q. But you do not object to their meeting the level.

A. No.

Q. Would you say that the movement in your experience from—prior movement to river, then during this period of 5½ cent rate application to the New York Central, then back again to the river when that rate is lifted, indicates that the level of the rate—you are not a rate man, but as a charge—

Mr. Murphy: I am going to object to this as being an extremely leading question on direct examination. I don't [fol. 565] know who is testifying.

Mr. Erickson: I will reframe it, sir.

Mr. Murphy: All right.

By Mr. Erickson:

Q. Has it been your experience that upon the publication of the 5½ cent rate all the grain went to the New York Central Railroad in your territory?

A. Very definitely from our area, yes.

Q. I am talking now of corn.

A. Yes.

Q. Was it your experience that before that time you were able to handle grain equally with other elevators?

A. On an equal basis, yes.

Q. I am talking of corn now.

A. Yes.

Q. And was it your experience that during the period of injunction that you could handle corn again?

A. Yes, we did.

Q. And after that what was your experience with respect to the corn handling?

A. We have handled none.

Mr. Erickson: That will be all on direct. Tendered for cross.

Cross examination.

My Mr. Murphy:

Q. Mr. Scott, how far is your elevator from the line of the New York Central Railroad?

[fol. 566] A. About three-quarters of a mile.

Q. South or north?

A. South.

Q. You said you are approximately 20 miles to the river, is that correct?

A. That is right, yes.

Q. What percentage of your corn moved direct from the farms to the river houses?

A. I can't give an exact figure, but over half did.

Q. More than 50 per cent of your corn was trucked directly from the farm to river elevator without ever seeing your country elevator, is that correct?

A. Yes, it did.

Q. How much corn did you ship by rail during the year 1956? You indicated you had handled 252,000 of—

A. I believe virtually none of that went by rail.

Q. All of it went to the river.

A. Yes, sir.

Q. Across the New York Central—

A. Right across the railroad, except cases where it came from north.

Q. You were able to buy corn north of the New York Central in competition with elevators located between you and those farms, is that correct?

A. Will you read that?

[fol. 567] (Question read.)

The Witness: Yes, that is right.

By Mr. Murphy:

Q. How far north?

A. Well, to the north, three to four miles would about catch it, straight directly north.

Q. You indicated that you have been in business at Scott for about six years, is that correct?

A. Yes, sir.

Q. Were you in the grain business prior to that time?

A. Not to that time, no.

Q. Was Scott Grain Company in existence prior to that time?

A. No, sir.

Q. You indicated that the river bids—I am not sure of this, but can you tell me where you have to have the corn when you get on a river bid?

A. The river always bids f.o.b. their elevator on the river.

Q. Is that f.o.b. in truck at the elevator?

A. Yes, sir.

Exam. Dahan: May I interrupt with a question? Who unloads the truck?

The Witness: The river elevator will unload the truck.

By Mr. Murphy:

Q. Are you now storing government corn in your elevator?

[fol. 568] A. No, sir.

Q. Are you storing any government corn?

A. No.

Q. You testified that 1957 was a better corn production year than 1956. Do you mean the 1956 crop was better than the 1955 crop, or the crop that was harvested last winter?

A. I may have made an error on that. Possibly—this is just a guess on my part, from my area, the two years were very close to the same, but maybe 1956 had a slight more than 1957. We did have excessive rain in 1957. I believe I did get that turned around. But the significance of the two years as far as we were concerned should be about identical.

Q. You mean the corn grown during the year 1957 was a greater amount than the corn grown during the year 1956?

A. I don't believe it would be any greater, possibly just a little smaller. I explained that we did have a wet season in the year of 1957 that did reduce it some, but no great amount.

Q. In comparison between the years 1956 and 1955, can you give me that comparison?

A. Between 19—

Q. The corn grown between the year 1956 and the corn grown during the year 1955.

[fol. 569] A. 1956 was, I believe, a superior year to 1955.

Q. Do you own trucks of your own?

A. We do own trucks, but not so much for grain use.

Q. You don't own trucks for hauling grain to the river.

A. No, we do not have an ICC permit of any kind to haul any grain for hire.

Mr. Erickson: For clarification, may we refer to that as Illinois Commerce Commission, please?

By Mr. Murphy:

Q. Isn't it a fact that your operation at Scott has been primarily as a broker rather than as an elevator operator in that you buy the corn at the field and have it shipped to the river without bringing it into your elevator?

A. I never considered myself as a strict broker.

Q. Well, do you take the possession on the corn?

A. Please explain that.

Q. Do you acquire ownership of the corn when you buy from the farmer?

A. Yes, we are responsible for that corn as to any lines, yes. The river house is not responsible for that. It is our corn.

Q. Do you consider yourself in the nature of a merchandiser rather than an elevator operator?

A. No, sir, because we have to maintain an elevator, taxes, insure it, and everything. If we didn't have this [fol. 570] elevator and scale and warehousing facilities, we couldn't be in the grain business.

Q. You don't use that on over 50 per cent of your business.

A. We haven't, no.

Q. How much more than 50 per cent of your business would it be that moves direct between the farm and the river?

A. Well, I would just be guessing, but maybe it would run up to 75 per cent.

Mr. Murphy: Thank you. That is all.

Redirect examination.

By Mr. Erickson:

Q. What is the principal reason for the grain to move direct from the farm to the river rather than at or through your facility?

A. We are saddled with a truck situation here which costs an extra cent to handle it through our local facility. I will explain. To haul the corn direct from the farm to our elevator is 2 cents. That is the local truck rate. The

truck rate from our elevator to a river facility in Morris is 3 cents, total, 5. If we hauled directly from the farm to the river facility in Morris, the trucking charge is 4 cents.

Q. In that hauling you are hauling grain to which you have title.

A. Yes, sir.

[fol. 571] Q. And to which—and for which you are responsible for delivery.

A. Yes, sir.

Mr. Erickson: That is all on redirect.

Exam. Dahan: You are excused.

(Witness excused.)

Exam. Dahan: We will have a five-minute recess.

(Short recess.)

Exam. Dahan: Come to order, please.

I. M. Funk was sworn and testified as follows:

Direct examination.

By Mr. Erickson:

Q. Mr. Funk, will you please give your name, your address, and your business experience.

A. My name is I. M. Funk, Kernan, 37 years in the grain business.

Q. What is your business address, Kernan, Illinois?

A. Kernan, Illinois.

Q. What is your position with the firm?

A. I am senior partner.

Q. How long has this elevator been at your location?

A. My father started it 60 years ago.

Q. Would you please take this crayon and indicate on the map the location of your facility. On what railroad is that located?

[fol. 572] A. Santa Fe.

Q. What is your nearest river point?

A. Nearest river point is Seneca.

Q. What is the truck charge to that point?

A. 2¾ cents.

Q. What is your nearest New York Central competitive point?

A. Missal.

Q. Have you a statement that you can offer for the record concerning the movement of corn by your firm for the years 1953 to 1957 inclusive?

A. Yes, sir.

Q. Separated as between free corn and government corn?

A. Yes, sir.

Q. Will you first please give us the free corn movement by rail and by river.

A. 1953—do you want the total?

Q. Total, yes.

A. The total was 128,730 bushels. Of that, by rail, 4,078 bushels; by river, 124,652 bushels.

In 1954 the total was 131,883 bushels; by rail, 106,880 bushels; by river, 25,603 bushels.

In 1955, the total was 155,115 bushels; by rail, 132,282 bushels; by river, 22,833 bushels.

In 1956, the total was 183,782 bushels; by rail, 155,918 [fol. 573] bushels; by river, 27,864 bushels.

In 1957, the total, 128,918 bushels; by rail, 74,626 bushels; by river, 54,292 bushels.

Q. That is a total of your nongovernment or free corn, is it not?

A. That is right.

Q. What did you have in government corn?

A. In government corn, 1953, nothing; 1954, nothing; 1955, 70,162; 1956, 8,422; 1957, 59,866.

Q. Going back to your 1957 figure of river shipments of 54,292, can you tell us how much of that occurred during the period of time that there was an injunction against the 5½ cent New York Central rate?

A. I would say in the neighborhood of 40,000 bushel. I don't have a definite statement of that.

Q. Now going to your rail shipments in 1957 of 74,626, will you please explain how that was forwarded? Did it go out Santa Fe?

A. Not all of it.

Q. How did you handle it other than Santa Fe if you are only located on the Santa Fe?

A. By arrangement with the elevator at Missal, we loaded through that elevator on cars for our own account the total of 42,269 bushels.

Q. Of that 42,269 bushels, which as I compute it, ap-
[fol. 574] proximates 57 per cent of the total by rail, did you have to bear the expense of the handling of that through the New York Central elevator?

A. Yes.

Q. Why is that?

A. Our customers could have sold that corn to either us or the elevator at Missal, and by arrangements whereby we paid a little over half of our commission to the Missal elevator, we loaded that much corn through that elevator for shipments.

Q. Do you think you could make such arrangement as a permanent thing?

A. We can't continue in business with that kind of arrangement, no.

Q. What was the purpose of handling this grain then during this period of time?

A. There was only one purpose, and that was to try to hold our customers that had been with us for years.

Q. Have you any recent prices on the New York Central Railroad versus the river the last day or so?

A. Yes, sir.

Q. Would you give them to us for the record?

A. You want the last two days?

Q. By dates, please.

A. Pardon?

[fol. 575] Q. Give us the dates and what the price bids were.

A. Well, starting on the 27th of January, the bid to me, loaded New York Central, was $1.0925. The bid delivered to the river by truck was $1.09. The bid loaded cars Santa Fe was $1.04⅝.

Q. Give us the most recent one that you have?

A. On the 31st of January, the New York Central bid $1.09, the river bid $1.075, the Santa Fe bid, $1.04⅞.

Q. With that kind of a price bid picture which bidding point would draw the corn?

A. Well, it would be the New York Central.

Q. Would it—it would be the New York Central.

A. Yes.

Q. Were you here when Mr. Scott testified with respect to pricing and how prices are made?

A. I was.

Q. If questions were put to you along that general line, would your answers be about the same?

A. They would.

Mr. Erickson: Is there any question in your mind, Mr. Murphy?

Mr. Murphy: Yes. I don't recall all of Mr. Scott's answers or questions as of this time.

Mr. Erickson: Would you care to have me put that—

Mr. Murphy: You might as well.

[fol. 576] By Mr. Erickson:

Q. Mr. Funk, from whom do you get your price bids?

A. I get them from Glidden Company and Continental at Seneca, Cargill Grain Company at Ottawa.

Q. From whom do you get your New York Central price bids?

A. From Payne Stottler Grain Company at Kankakee.

Q. And on the basis of those bids you then determine what you can pay at the elevator for the farmers' grain, is that correct?

A. That's right.

Q. With respect to the settlement, you settle with the farmer, do you, on anything delivered at the river?

A. Yes, sir.

Q. As well as anything handled for you by the New York Central?

A. Yes.

Q. If anything is handled on the New York Central, is it made in your name?

A. Yes.

Q. On your bill of lading?

A. That's right.

Mr. Erickson: That is all I will have on direct. Maybe there are some others here.

Cross examination.

By Mr. Murphy:

Q. During the time the New York Central's rate was [fol. 577] enjoined in the Federal Court what was the relationship of river bids to Santa Fe bids?

A. River bids were somewhat more favorable during that period than the Santa Fe bids.

Q. Let us take back in 1956 then. Can you tell me how the river bids and the Santa Fe bids were at that time?

A. The Santa Fe bids were better than the river, as evidenced by my shipments. I can't quote you those bids. I can't tell you the bids during 1956, but as evidenced by my shipments, the Santa Fe, I assume, were better.

Q. Has that generally been true for a number of years?

A. When the Santa Fe made that rate—I think it is 18 cents—it put us on a better footing to ship by rail than it did by water.

Q. When did that rate become effective?

A. I can't quote the date—within the last three years.

Q. The river bids have come up in relationship to the Santa Fe bids since the New York Central rate has been in effect.

A. It would appear that way.

Q. What area do you buy corn in, Mr. Funk?

A. I beg your pardon.

Q. What is the area from which you draw corn?

[fol. 578] A. Well, we get an area of three to four miles, possibly four and a half, north and northeast and northwest of us. South of us it is only a mile and a half, which is theoretically halfway to the New York Central. We are three miles from the New York Central, so theoretically our territory would be a mile and a half.

Q. Do you ever truck corn directly to the river without elevating it through your elevator?

A. We have done that, yes.

Q. Right from the farm to the river.

A. That's right.

Q. Would your trucking costs or charges from the southernmost area from which you draw be different than the charges from the northernmost area that you draw to the river?

A. You mean direct from the farm to the river.

Q. Yes.

A. Yes, because the river is north of us, and the longer the haul, the higher the rate.

Q. The trucking charges are not a fixed amount, they vary with the distance from the river.

A. They vary more or less with the distance, yes.

Q. How far is your elevator from the river, sir?

A. We are 18 and a fraction miles from Seneca.

Q. Can you tell me where the corn that you bought, the [fol. 579] preponderance of the corn that you bought in 1956, moved, the rail tonnage, that is?

A. Where it moved?

Q. Yes. Did that move east or did it move south?

A. Our rail shipments on the Santa Fe have always been east with very few exceptions.

Q. To Chicago?

A. To Chicago.

Mr. Murphy: That is all I have.

Exam. Dahan: Redirect.

By Mr. Chartrand:

Q. Prior to the establishment of this 5½ cent rate, about what per cent of your business did go to the river? Is it reflected in the figures given for the years 1953 to 1957?

A. Well, not on a percentage basis. I have the bushels by rail and by river.

Q. I see. Now, in so far as your competitors are concerned, let's say, at Streator, Missal, Richards, were you all in a similar competitive position—

Mr. Murphy: I am going to object if we are going to ask questions on redirect that attempt to encompass the whole direct case. I don't know that this is directed to any of my cross examination, your Honor.

Mr. Erickson: It is my understanding we are still on cross, Mr. Murphy.

[fol. 580] Mr. Chartrand: Yes. You are the first cross and Mr. Hayes has deferred, and I am getting down to my cross now.

Mr. Murphy: You don't consider this an adverse witness, do you?

Mr. Chartrand: He is not my witness.

Mr. Murphy: I ask for a ruling on this as to whether after my cross examination parties who are protesting are going to be permitted to come in and ask what they allege or purport to be cross examination and cover the whole direct, for the obvious purpose of establishing the same points that the direct questioner has attempted to establish.

Exam. Dahan: I will permit it this time, but in the future we will have all those on the one side ask their questions at one time before we get to the other side.

By Mr. Chartrand:

Q. Of the grain that was handled through the Missal elevator, did it come out of your elevator at Kernan or was it trucked direct from the country?

A. It was handled both ways.

Q. Most through your elevator or most direct?

A. I would say a little more direct than through my elevator.

Mr. Chartrand: All right, thank you.

[fol. 581] Exam. Dahan: You are excused.

(Witness excused.)

Mr. Erickson: I call Mr. Antram.

R. C. ANTRAM was sworn and testified as follows:

Direct examination.

By Mr. Erickson:

Q. Will you please give your name, your address, and your business location.

A. My name is R. C. Antram. My business location is Grand Ridge, Illinois, address the same.

Q. What are your duties at the Grand Ridge Cooperative Grain & Supply Company?

A. I am manager.

Q. How long have you been connected with the Grand Ridge Cooperative Grain & Supply Company?

A. I have worked for the Grand Ridge Cooperative Grain & Supply Company for 12 years. I have been manager for the last four years.

Q. Do you have prior experience in elevator operation?

A. Well, when I was a young boy I worked at this same place for a couple of years, but up until then I never had experience, only just since I have been back there.

Q. Can you indicate for the record, stating and also pointing to the location of your facility.

Now, is Grand Ridge, Illinois located at about a mid-[fol. 582] point between the New York Central Railroad and the river?

A. We are located eight miles from the river and eight miles from Streator, and the New York Central goes through Streator.

Q. And what town on the river are you referring to when you say you are located eight miles from the river?

A. Ottawa, Illinois.

Q. In the course of your experience of handling grain purchases and sales and elevation at Grand Ridge, were you able to compete with other elevators in the general area which you reach?

A. We have, yes.

Q. How extensive is that general area that you reach prior to the 5½ cent rate?

A. Well, I would say we would go three miles south of Grand Ridge; we go further west than we do—we go about five miles west, and we go about six miles east of Grand Ridge, and we go—we have some customers that are within a mile of Ottawa, but our general customers, I would say four miles north of Grand Ridge.

Q. Do you have any competitors reaching the same territory?

A. There are competitors from the north, from Ottawa.

Q. From Ottawa.

[fol. 583] A. And Mr. Freeman that sets at Richards Crossing, which is four miles south of us.

Q. When this 5½ cent rate was established on the New York Central to Kankakee, Illinois, did you notice any effect upon your operations?

A. Why, yes, I noticed some effect. The farmers would come in and tell me about how much they could get to a certain place, and that is the effect it had on me.

Q. What have you been able to do to retain and meet this business.

A. I have figured, done a lot of figuring, and I could never figure out where I could ever meet it, so I just had to let them go wherever they wished, that's all.

Q. Have you lost business to other parties as a result of this New York Central 5½ cent rate that you know of?

A. Well, I know of some customers that went the other way. They always did used to deal with us, but then that is just one of those things, you don't know. They was always dealing with us until that came into effect, and then another man got them.

Q. I am going to ask just a few questions on pricing. Where do you get your bids from?

A. I get my rail bids from Payne Stottler at Kankakee.

Q. Where do you get your river bids from?

A. From Glidden at Seneca, I get river bids from Con-

[fol. 584] tinental at Seneca, I get river bids from Norris Grain Company at Ottawa, Illinois, and Cargill at Ottawa, Illinois.

Q. This matter of bids, is that a matter of pretty general public knowledge?

A. That's right.

Q. And everybody in the area knows what the other party is bidding, do they not?

A. That is correct.

Q. In fact, do they use some kind of an information service to convey this information to each other?

A. Well, now, you mean as far as the river calling the different grain—

Q. We will take that first.

A. The river calls all the grain dealers, if they are any kind of customer at all, if they sell them anything at all, the river always calls them and tell them what they are bidding.

Q. Now let us go to the rail, New York Central rail, how does that obtain?

A. The New York Central rail rate in our locality is obtained through our elevator, the other elevators call us to see what Payne Stottler Grain Company is bidding by New York Central.

Q. In other words, then, you convey to other parties [fol. 585] information concerning the New York Central bids?

A. That is correct.

Q. So you are thoroughly familiar with what the bids are from day to day.

A. That's right.

Q. Did a Mr. Erickson from the Chicago Board of Trade call upon you to check the records with respect to bids over an extensive period of time?

A. He did.

Q. Am I that Mr. Erickson?

A. You are.

Q. So that the bids that were recorded are those which have been offered by various parties either at the river or at the New York Central rail point.

A. That's right.

Q. Do you have any opposition to a railroad meeting its competition?

A. I don't have any opposition to a railroad meeting its competition as long as it is fair competition and not destructive competition.

Q. Have you ever heard of—pardon me. Go ahead.

A. I was going to say—

Mr. Murphy: I think his answer was responsive and complete.

By Mr. Erickson:

Q. Have you ever heard of industries, grain elevators, [fol. 586] not located on the New York Central using mechanical loading devices on the New York Central?

Mr. Murphy: Objection as hearsay.

By Mr. Erickson:

Q. Do you know of elevators using mechanical loading devices?

Mr. Murphy: I continue the objection, in that there is no way of indicating that he has a basis for having such a knowledge. You ask a question like that and get a hearsay answer in the record, and it is improper.

By Mr. Erickson:

Q. Are you familiar with the means of loading grain cars on the New York Central Railroad?

A. I am.

Mr. Murphy: Can you qualify him for that, Mr. Erickson, before you pursue your question?

By Mr. Erickson:

Q. How do you know of grain being loaded on the New York Central?

A. The man that I think you are asking me about—

Mr. Murphy: Well, now—

By Mr. Erickson:

Q. Do you have personal knowledge of it being loaded there?

A. I have this knowledge, that—

Mr. Murphy: If he is going to answer the question—

By Mr. Murphy:

Q. Just answer the question. Do you have personal knowledge of grain being loaded on the New York Central Railroad.

[fol. 587] A. I have this knowledge, that the man calls me and wants to know where to bill these cars to on the New York Central.

Q. Do you know whether that man has an elevator facility at that place?

A. He has no elevator on the New York Central.

Q. Do you know whether he possesses and uses a grain loading device that is portable in nature?

A. Yes.

Q. Does he use it?

A. He does.

Q. Where is that located?

A. It is located in Streator, Illinois.

Q. Located at Streator, Illinois.

Mr. Erickson: I think that will be all on direct.

Exam. Dahan: Mr. Chartrand, do you have any questions?

Mr. Chartrand: No questions.

Exam. Dahan: Mr. Murphy.

Cross examination.

By Mr. Murphy:

Q. Is this gentleman to whom you referred Mr. Ike Barrett?

A. That is who the man is.

Q. Does Mr. Barrett have facilities on the New York Central, corn storage facilities and other facilities on the [fol. 588] New York Central?

A. I couldn't—I know he has corn facilities in Streator for government corn.

Q. Yes. Has he got a scales there?

A. There is a scales there, too.

Q. That is not something new, is it?

A. That was put there—well, I wouldn't swear to the date, but I think it is two or three years ago, something like that.

Q. Thank you. Mr. Antram, you indicated that some farmers said they could get better bids elsewhere. Can you tell me what portion of the area you serve where these farmers are located?

A. They are located right on the south side of my territory because the New York Central is south of me, see, and it is on the south edge of my territory.

Q. Are any farmers located in the north or the northwest portion of your area that ever so indicated to you?

A. None that I ever know of. They talk about it, but they have never talked about going that way.

Q. Do you move corn direct from the farm to the river elevator?

A. Does our elevator? You mean direct to the river?

Q. Yes.

A. The farmer delivers it direct from the farm to the [fol. 589] river, and we move corn direct from the elevator to the river, too. Is that what you mean?

Q. I just wanted to know whether or not the corn sold on the river bids moves from the farm to the river elevator without going through your country elevator.

A. Some of it does, yes.

Q. What proportion of it?

A. Well, I don't have any figures like that. I couldn't tell you exactly. I would say we used to always figure that 50 per cent of the corn that we handled goes riverwise because—

Q. Without going through your elevator.

A. That's right, because there is a certain amount of them farmers that just live within two or three miles of the river or four miles, and they are lots closer to them than they are to us.

Q. Mr. Antram, unlike the other two witnesses that have preceded you, the last two witnesses that have preceded you, you haven't given us any statistics as to business of 1957 versus preceding years. Do you have those figures with you?

A. I have them— Mr. Erickson there. I give them all to Mr. Erickson there if you want to see them.

Mr. Erickson: I am sorry. I didn't know he didn't have a copy.

[fol. 590] The Witness: I didn't have any copies at all.

By Mr. Murphy:

Q. Was your business in 1957 as good as it was in 1956?

A. No, sir.

Q. How many bushels did you handle in 1957?

A. These are figures that are up in my mind, and I will give them to you—

Q. You don't have them on that paper there?

Mr. Erickson: I am sorry. I gave you the wrong one.

The Witness: I don't have the right paper.

1,695,000 bushels last year. That is 1957.

By Mr. Murphy:

Q. What was that again?

A. In 1957, on corn, we handled 1,179,398 bushels. In 1956 we handled 1,129,997 bushels of corn. In 1955 we handled 1,046,072 bushels of corn. That isn't any corn that has anything to do with CCC. This is just corn that we have bought ourselves.

Q. Do you handle any CCC corn?

A. We handle some.

Q. Do you have the figures on that?

A. Not right here, no. I can tell you how much CCC corn we handled last year because I can remember.

Q. Can you tell me how much of the 1,179,000 bushels of corn that you handled in 1957 moved by rail?

[fol. 591] A. Seventy-eight cars.

Q. And that would be approximately how many bushels?

A. Figure 1800 bushel to a car. Some of them don't hold that much and some of them hold 2,000, but you can figure—just average it out. In 1956 we shipped 258 cars by rail. In 1955, if you wish it, we shipped 208 cars by rail.

Mr. Murphy: Thank you. That is all on cross.

Exam. Dahan: Do you have any redirect, Mr. Erickson?

Mr. Murphy: There is one question for clarification, if I may ask before you start.

Exam. Dahan: Very well.

Mr. Murphy: How much of this 78 cars that moved in 1957 was CCC corn?

The Witness: None.

Mr. Erickson: Counsel, he stated all of the figures he gave was not CCC.

Mr. Murphy: He was giving tonnage figures then. The 258 and the 208 cars in 1956 and 1955 were likewise all free corn?

The Witness: No government corn in any figures I have given you at all.

Exam. Dahan: Any redirect?

Mr. Erickson: No.

Exam. Dahan: You are excused.

[fol. 592] (Witness excused.)

Exam. Dahan: Next witness.

Mr. Erickson: Mr. Tallyn.

RONALD E. TALLYN was sworn and testified as follows:

Direct examination.

By Mr. Erickson:

Q. Will you please give your name, address, business location?

A. My name is Ronald E. Tallyn. I am with the Wenona Grain Company at Wenona, Illinois.

Q. What is your position with that firm?

A. I am manager and also a partner in the firm.

Q. What is the capacity of that elevator?

A. 335,000 bushels.

Q. How long has that elevator been at that location?

A. Well, we have three elevators, we have two old wooden houses that have been there for 50 years probably, and a concrete house—a new concrete house that has been there for seven years.

Q. Would you please identify on the map and for the record the location of your facility?

A. The intersection of the New York Central and the GM&O Railroad.

Q. It is located at the intersection of the Illinois Central and the GM&O Railroad at a point lying south of the New [fol. 593] York Central Railroad.

A. About 4½ miles.

Q. What is the point of your nearest New York Central competition?

A. That is the four and a half miles, Lostant, Illinois.

Q. What is the distance to the Illinois River?

A. It varies from 20 to 24 miles. We are available to three or four different locations.

Q. What would it be to, say, Spring Valley, Illinois?

A. About 24 miles.

Q. What is the truck charge to that point?

A. You are speaking of corn.

Q. Corn.

A. Two and one-half cents per bushel.

Q. Did you prepare a record of your figures of movement for certain periods of time?

A. Yes, I did.

Q. Do you have that for the record?

A. I have. For 1955 corn purchased, 214,535 bushels.

Q. May I stop you for a moment, Mr. Witness. Would you advise us whether that is for the calendar year 1954-55 or is it for some other period?

A. This is the 1954-55 fiscal year ending June 30.

Q. All right. Now continue.

A. For 1955-56 fiscal year we purchased 270,189 bushels. [fol. 594] During 1956-57 fiscal year we purchased 294,347 bushels.

Q. Are we now talking altogether about free corn?

A. That is corn purchased.

Q. Corn purchased. Would you give us the CCC corn figures you may have.

A. During the 1954-55 fiscal year, 261,678 bushels; during 1955-56, 350,159 bushels; and during 1956-57 fiscal year, 244,678 bushels.

Q. If I would understand your free corn figures correctly, you shipped more free corn in the fiscal year 1956-57 than you did in the preceding year.

A. That is correct.

Q. Have you been hurt by this 5½ cent rate adjustment that has been put into effect by the New York Central Railroad?

A. We haven't from the standpoint of bushels handled, but we figured that this was a temporary condition which would be remedied, and in order to hold our old-time customers, of which I have had the experience to find out that if you lose one, he is practically gone for a year or two—we have met these New York Central bids at a cost of around $1800 last year, during 1957.

Q. Has that been a cost which you have had to stand as the Wenona Grain Company?

A. Definitely; that is correct. I might add that—if it is [fol. 595] permissible—

Q. Go right ahead.

A. We have had a high percentage of government compliance with corn which has left a smaller amount of free corn available, and this year it is the reverse, so that if this condition continues, it is going to hurt us more in proportion.

Q. Now, Mr. Tallyn, you heard the statements of the prior witnesses concerning how prices were obtained and so forth. If the same questions were put to you, would your answers be substantially the same?

A. They would.

Mr. Erickson: I will tender the witness. More direct, anyone else?

Mr. Hayes: No.

Mr. Erickson: I tender the witness for cross.

Cross examination.

By Mr. Murphy:

Q. I understand you felt you were injured in the amount of $1800 on tonnage of 294,000 bushels—I mean on a volume of 294,000 bushels?

A. Not exactly that because while that restraining order was in effect, it didn't affect us. We weren't forced to bid up during that period.

Q. This is the 1956-1957 fiscal period, is that correct?

A. That's right.

[fol. 596] Q. The restraining order was—

A. That's right, that was in August of 1957, correct?

Q. Is Spring Valley your principal port?

A. You mean on the river?

Q. Yes.

A. Lacon, Henry, Spring Valley, or LaSalle. We are about the same distance, within a few miles of any of the four points.

Q. You are running into competition from outlet via the New York Central versus outlet Lacon, Henry, and Hennepin, is that correct?

A. And also our other rail connections.

Q. How much of the 270,000 bushels of corn that you handled during the 1955-56 fiscal year moved by rail?

A. I don't have the figures exactly. I would say from 50 to 60,000 bushels.

Q. Fifty to 60,000 bushels by rail?

A. Right.

Q. Was that all free corn, or was that—

A. That was all free corn, yes. Practically all the government corn was—

Q. You mean approximately 50,000 out of the 270,000—

A. Right.

Q. —moved by rail.

A. That's right.

[fol. 597] Q. All of the balance of the free corn moved to the river, is that correct?

A. Yes.

Q. When that moved to the river, did it cross the New York Central Railroad?

A. Except what went to Lacon or to Henry did. Spring Valley and LaSalle, we have to cross the New York Central. Going to Lacon or Henry, we don't.

Q. What are your truck charges to the river again?

A. Two and one-half cents per bushel on corn.

Q. For the 24 miles, is that correct?
A. Right.
Q. Are you in the trucking business yourself?
A. Not at all.
Q. That is for hire transportation.
A. That's correct.
Q. Do you ever move any of this corn directly from the farm to the river?
A. Yes.
Q. What percentage of the corn that moves to the river moves direct from the farm without going through your elevator?
A. About 1 per cent.
Q. About 1 per cent.
A. Correct.
[fol. 598] Q. Can you give me the figures, breakdown of how much of the 294,000 bushels of corn, free corn, that is, that you handled during the 1956-57 period and tell me what proportion of that went to the river?
A. Oh, roughly 200, 220,000.
Q. Did all of that corn move to Chicago that moved by rail?
A. No, different locations.
Q. Did it move south?
A. Some went to Peoria, some to—

Mr. Chartrand: I object, Mr. Examiner. He hasn't been qualified to know what the subsequent movement of corn is up or down the river.

Mr. Murphy: I am talking about his rail movement, sir, and he has billing on that.

Mr. Chartrand: I beg your pardon.

The Witness: Some moved to Peoria, and I don't remember if any went to Decatur in that particular year or not, but we occasionally ship to Decatur.

By Mr. Murphy:

Q. Then the preponderance of the rail movement does not go to Chicago, is that correct?
A. Other than CCC, no.

Q. You indicated there was a higher compliance with the price support program during 1957, is that my understanding—

[fol. 599] A. During 1956 than there was during 1957.

Q. Are you speaking of the 1956 crop year?

A. 1956 crop year, yes; more farmers complied with the acreage reduction in 1956 than they did in 1957.

Q. How about the corn going into storage, is that related to the price support program also?

A. You mean government corn going into storage?

Q. Yes. Was there a greater volume going into storage of the 1956 crop than of the 1955 crop?

A. That of the 1955?

Q. Yes.

A. Well, in our own location it didn't vary very much. Our storage facilities have been filled each year, and I would say there is not enough difference to quibble about.

Q. So far as you know, you don't know of any variations?

A. No. It was very minor.

Mr. Murphy: Thank you. That is all I have.

Redirect examination.

By Mr. Erickson:

Q. How much of this grain which moved to the river moved while the restraining order was in effect?

A. I didn't bring those figures with me, Mr. Erickson.

Q. You don't know whether it was substantial or not?

A. During that period it was slight. I remember that.

[fol. 600] Mr. Erickson: That is all.

Exam. Dahan: You are excused.

(Witness excused.)

Exam. Dahan: Call your next witness.

Mr. Erickson: Mr. Ed Herron, please.

Mr. Herron has a prepared statement which will be distributed to all parties. He appears here in behalf of the Illinois Grain Dealers Association.

Direct examination.

By Mr. Erickson:

Q. Please give your name, address, business connection.

A. My name is E. S. Herron, and I am executive secretary of the Illinois Grain Dealer's Association, a trade association representing members who own and operate elevators at more than 400 different stations in the state. We have members who are located on the New York Central; some who are located on roads that bisect the New York Central; and others who are on lines that compete in the same general area.

Q. Are you here, Mr. Herron, at the direction of your association following a resolution?

A. I am.

Q. Will you continue with your statement, please?

A. At our annual meeting in May of last year, one of the resolutions adopted was that the association, through its [fol. 601] secretary, should use its best efforts to see that obvious grain rate inequities should be corrected and restored to the normal pattern as between stations and railroads.

I want to make it clear that I am not here in behalf of, nor for any organized grain market, nor for any railroad. I am here in behalf of the numerous country grain dealers who have suffered monetary losses by reason of an unequal grain rate in their territory.

Mr. Murphy: I am going to object to this witness testifying about the situation of some people who are not present here. I ask that that be stricken.

Mr. Erickson: If the examiner please, this man is executive secretary of the association and is familiar with the matter on which he speaks.

Mr. Murphy: Well, I am going to object to it, unless he is going to particularize in regard to the monetary losses caused to numerous country grain operators. If he is going to list each one of them and tell us the amount of the loss and those factors, that is all right, but if it is going to be a general statement like this, I object to it going into the record. Is he prepared to do that?

Mr. Erickson: On what grounds are you objecting when [fol. 602] he has stated he is proceeding on the basis of resolution offered and adopted by the association?

Exam. Dahan: I will strike that sentence out. That last sentence will be stricken.

You may continue.

The Witness: This rate has caused grain dealers on competing rails to bid or pay an unwarranted price for grain which normally and historically came to their stations. This has caused grain to be marketed and delivered to terminal position in an entirely abnormal pattern.

The very history of the country elevator trade and the construction of these elevators, some of which are more than 50 years old, was built upon the premise that they would be able to compete with one another on equal grain rates—both on-line and off-line railroads. To find oneself suddenly at a disadvantage against other points who are enjoying a lower transportation cost does not seem to me the intent and purpose of our historical equalized rate structure—nor would it seem to me that there is any logical foundation for the establishment of such a rate, either permanent or temporary.

Mr. Murphy: Your Honor, I am going to object to him telling about what some other people are being forced to do, and I move that the sentence up to the simicolon are [fol. 603] stricken.

Exam. Dahan: I haven't read it yet.

Mr. Erickson: Mr. Examiner, if you please, if you care to elaborate this point, counsel, I will establish the fact that he has personally been with these various people of whom he speaks and has personal knowledge of the fact that they have losses.

Mr. Murphy: Well, I have no opportunity to cross examine on some conversations that may have taken place somewhere. I object to that as being hearsay, your Honor.

Exam. Dahan: We can't strike it until he reads it into the record. Read it.

By Mr. Erickson:

Q. Mr. Herron, have you seen any of the facilities here of which you speak?

A. Yes, sir.

Q. Were you with Mr. Erickson when he made a tour of various facilities throughout this territory and personally inspected the records of some of these firms?

A. I was.

Q. Are your statements here predicated upon that which you saw at that time?

A. It is.

Q. Go ahead.

A. Country grain dealers competing in this situation are [fol. 604] being forced to use other forms of transportation and rent temporary or semi-permanent facilities as a matter of defense.

Mr. Murphy: Your Honor, I object to the sentence starting with "Country elevators" and up to the point the witness has just concluded.

Exam. Dahan: It may be stricken.

Mr. Erickson: If the examiner please, the witness just qualified himself as having seen the records of various firms, handling grain in the manner here described. He has personally seen the facilities of which he speaks.

Exam. Dahan: I think those country grain dealers are here, and let them speak for themselves.

Mr. Erickson: They are not all here.

Exam. Dahan: We don't have to have cumulative evidence to have all, as long as we have some. If he is speaking for the country grain elevators, and his testimony be nothing more than cumulative, there would be no necessity for receiving it, if they are going to be here, so I am striking that from the record.

The Witness: It is their hope and the hope of our association that the rails and this commission so adjust the grain rates that we are again in a "fair competitive position."

[fol. 605] By Mr. Erickson:

Q. Does that conclude your statement?

A. That concludes my statement.

Q. How many members are there in your association?

A. We have something over 300, and we operate about 400 country stations throughout the state.

Mr. Erickson: Tendered for cross.

Mr. Hayes: Mr. Examiner, you have ruled on this, but obviously we can't bring in 400 country elevator operators.

Exam. Dahan: Of course we don't want to receive the evidence of 400 country grain elevators. It would be nothing more than cumulative, so it wouldn't make any difference.

Mr. Chartrand: Mr. Examiner, I would like ask Mr. Herron a further question with regard to why he is here.

By Mr. Chartrand:

Q. Does this organization to which you belong have a transportation committee?

A. We do.

Q. For the consideration of transportation matters.

A. We do.

Q. Is that committee duly appointed or elected by the membership?

A. It is appointed by the president.

[fol. 606] Q. Did that committee consider the subject here under discussion today?

A. They did.

Q. And did their consideration or conclusion with regard to that result in instructions to you to appear here for the purpose of expressing their views?

A. Right.

Q. Does this statement reflect their views?

A. It does.

Cross examination.

By Mr. Murphy:

Q. You referred to the fact that the effect of the New York Central rate has caused grain dealers and competing rails to bid or pay an unwarranted price for grain. Do you mean a higher price for grain, for corn?

A. Yes, that's right, in order get it.

Q. In order to get it. Because the competition was there, the higher prices were paid to farmers to get the grain. Thank you.

You indicated many of the country elevators were constructed 50 years or more ago.

A. That's right.

Q. At that time how did the corn that moved through those country elevators move to market?

A. I think historically most all of it moved through the [fol. 607] houses into boxcars and marketed.

Q. Historically you had a rail movement of all the surplus grain from this area out of the area.

Has there been a change in that situation?

A. Yes.

Q. What has been the big change?

A. The river has entered into the marketing of the corn.

Q. Has that caused diversion of the corn from the rails to the river?

A. Yes.

Q. To any great extent?

A. I would say yes.

Q. You would say yes?

Taking an elevator near the river as compared with one, say, south of the New York Central, does that change the relative position of those two elevators?

A. Elevator south of the New York Central and one north of the New York Central, you say?

Q. Take an elevator that would be right near the Illinois River, within a mile of the river, located on a rail, and take an elevator that would be—take an elevator at Rutland, for example, which would be substantially south of the New York Central. Now, prior to the time that the barges came in those elevators were, I assume in your un- [fol. 608] derstanding, fairly and competitively aligned in so far as rates are concerned.

A. That's right.

Q. Well, now, when the barge line came in, did that change the competitive situation of those two elevators?

A. I expect the house that was located north of the river—I mean, the New York Central—probably most of their grain went to the river.

Q. I mean, did they have any advantage over the elevator that was at Rutland?

A. They probably had a transportation advantage.

Q. That was a change that occurred when the river—

A. Yes, became—

Q. Became a factor. Did your organization take any position at the time those competitive relationships were disrupted?

A. Before I became secretary, the association worked with the railroads, as I am told, in establishing our lake local rates. I think that was—that is a guess on my part, but I think it was in the late 1930s.

Q. Are all the elevators that are members of your association in agreement with the position that you stated here today?

A. They did not do any objecting at our convention when this resolution was passed.

[fol. 609] Q. How was it passed, by voice vote or by ballot?

A. By voice vote.

Q. Do you know whether there were any negative votes?

A. Not that I recall.

Q. You don't know whether there were.

A. I don't recall any, and I was there.

Mr. Murphy: That is all I have.

Mr. Erickson: That will be all.

Mr. Hayes: Just a minute. I would like to ask a question.

By Mr. Hayes:

Q. Mr. Murphy was asking you about 50 years ago and the late 1930s. Do you recall his line of questioning?

A. I think I can pick it up.

Q. At the time when river transportation was established you indicated to him that a larger amount of grain—not a larger amount, but some grain—began to move by water. Do you recall that? Was that due to the lower basis of water rates as compared to rail rates in principal part?

A. In principal part, yes.

Q. Has that relationship, lower basis of water rates than rail rates, continued since 1933 or 1934 or 1935 or so?

A. To the best of my knowledge it has.

[fol. 610] Q. Until this 5½ cent rate came in.

A. Right.

Mr. Hayes: That is all.

Exam. Dahan: You are excused.

(Witness excused.)

Mr. Erickson: If the examiner please, there are three other men who have come from downstate and desire to make a brief statement. In view of the nature of the evidence given it seems that a brief statement will suffice for each one rather than to go through all of this, and I would like to call Mr. Francis McGowan from Blackstone, Illinois.

(Witness sworn.)

Francis J. McGowan was sworn and testified as follows:

Direct examination.

By Mr. Erickson:

Q. Will you please give your name, address, business location?

A. Francis J. McGowan, Blackstone, Illinois, manager of the Blackstone Farmers Grain Company.

Q. What is your position with that firm?

A. Manager.

Q. What is the nature of the firm? Is it a partnership or—

A. No, sir, stock ownership.

[fol. 611] Q. How long have you been manager of that firm?

A. Two years.

Q. Have you had prior experience in elevator operation and management?

A. No, sir.

Q. In the two years you have been operating that elevator have you had occasion to notice any change in the

flow of your traffic from its previous direction to some other direction?

A. Yes, sir.

Q. Will you please tell us what that is?

A. Well, it has been going to the New York Central.

Q. Are you able to ship it on the New York Central?

A. No, sir.

Q. Do you have any facilities by which you can ship on the New York Central?

A. No, sir.

Q. Has it been a loss of business to you?

A. Yes, sir.

Q. Have you heard the prior witnesses of elevator operators here?

A. Yes, sir.

Q. If the same questions were to be put to you as were put to them—

Exam. Dahan: Did you identify the others?

[fol. 612] By Mr. Erickson:

Q. Such as Mr. Funk and Mr. Scott?

A. Yes, sir.

Q. If similar questions were put to you as put to them, would your answer be approximately the same?

A. Yes, sir.

Q. You would say you have been hurt by the publication and maintenance of this rate.

A. Yes, sir.

Q. If it should be continued, would it affect you in the future?

A. Yes, sir.

Mr. Erickson: That is all I have on direct.

Cross examination.

By Mr. Murphy:

Q. Would your answers on cross examination be along the same line as the answers of the other witnesses?

Mr. Murphy: I have no other cross examination.

Exam. Dahan: You are excused.

(Witness excused.)

Mr. Erickson: Mr. Thomas, please.

Maybe we ought to recess until after lunch.

Exam. Dahan: Let us get the short ones out of the way and they won't have to come back.

Ross THOMAS was sworn and testified as follows:

[fol. 613] Direct examination.

By Mr. Erickson:

Q. Will you please state your name, address, business connection, and its location?

A. Ross Thomas. I am from Ransom, Illinois, Farmers Elevator Company, and I am manager of the company.

Q. What is your experience in the operation of this elevator?

A. I have been manager for one year.

Q. If you were to give us a general statement of your volume of business, would you say that your business is the same today as it was, say, in 1956?

A. No.

Q. Have you lost business to other parties?

A. We have.

Q. And to what parties have you lost business?

A. Well, principally Cahill Grain Company on the New York Central.

Q. That elevator is located on the New York Central.

A. That is correct.

Q. Business which you formerly enjoyed is now going in that direction.

A. That's right.

Q. Is there any means by which you can help yourself to recover this business of which you have knowledge?

A. Not at the present time, no.

[fol. 614] Q. Without a location on the New York Central yourself, is that correct?

A. That is correct.

Mr. Erickson: That is all I have of this witness on direct.

Mr. Murphy: I have just a few questions.

Cross examination.

By Mr. Murphy:

Q. How far are you from the river point that you use?

A. About 12½ miles.

Q. What is that port?

A. That is Seneca.

Q. Do you cross the New York Central on your way to the port with the grain?

A. We do not. The New York Central is south of us.

Q. Can you tell me what proportion of the grain that you handle moves by rail. Free corn I am referring to.

A. May I look at some figures? Would you want those figures for 1957 or prior years or—

Q. Give them to me for 1956 and 1957. I think that would be all right.

A. Take the year of 1956, we moved about 90,000 bushels of corn by rail and about 197,000 by barge.

Q. Was that all free corn?

A. That is correct.

[fol. 615] Q. Ninety thousand bushel by rail moved to Chicago, did it?

A. That's correct.

Q. Would your figures be similar for 1957?

A. No, they would not. 1957, we didn't move any cars by rail.

Q. How much to the river?

A. Two hundred thousand bushels.

Q. So your business was higher in 1957 than 1956?

A. No. Our total volume in 1956 was 287,000 and in 1957, 200,000.

Mr. Murphy: That is all I have.

Redirect examination.

By Mr. Erickson:

Q. Would you give the same answers substantially such as the prior commercial witnesses, such as Mr. Funk and Mr. Scott, with respect to these general questions as were put to them regarding pricing, et cetera?

A. I would.

Q. And you would adopt their testimony as your own then?

A. I would.

Mr. Erickson: That is all.

Recross examination.

By Mr. Murphy:

Q. When you were moving corn during the year 1956, you shipped some by rail and sold some at the river.

[fol. 616] A. That is correct.

Q. What percentage of the corn that you sold to the river moved direct by truck to the river without going through your elevator?

A. I would say about 60, 65 per cent.

Q. The preponderance of it doesn't go through the elevator.

A. That would be right.

Q. You receive bids from both rail bidders and river bidders, I assume.

A. That is right.

Q. In 1956, prior to the time the New York Central's rate became effective, how did the river bid and the rail bid compare?

A. I don't have those figures with me, so I couldn't answer that.

Q. Was the river bid higher than the rail bid or lower than the rail bid?

A. Well, evidently they must have been because of the fact that the preponderance of the corn did move by barge.

Q. You don't have a recollection of the bids.

A. No.

Mr. Murphy: That is all I have.

[fol. 617] Exam. Dahan: You are excused.

(Witness excused.)

Mr. Erickson: Mr. Gage.

LAURENCE GAGE was sworn and testified as follows:

Direct examination.

By Mr. Erickson:

Q. Will you please give your name, your address, and your business location.

A. Laurence Gage, Marsailles, Illinois.

Q. Do you operate an elevator at that point?

A. We have an elevator there at that point, yes, sir.

Q. On what line is it located?

A. On the Rock Island Railroad, main line.

Q. Has that been in operation for a long period of time?

A. A good many years.

Q. How long have you been operating the elevator?

A. Approximately ten years.

Q. In the course of that period of time and prior to the publishing of a 5½ cent New York Central rate were you able to compete with other parties in your general area?

A. Well, we were right on the—

Q. In the buying of grain.

A. No.

[fol. 618] Q. Are you on the river?

A. We are on the river.

Q. How do you handle your grain purchased from the farmer?

A. Direct to the river.

Q. Direct to the river. Do you unload it on the river yourself?

A. No.

Q. How do you get it to a facility on the river?

A. Trucks.

Q. Were you here when Mr. Funk and Mr. Scott testified as to how price bids were established?

A. Yes, sir.

Q. Would your answers be the same as theirs if the same questions were put to you?

A. Yes, sir.

Q. Have you been hurt by this change of rate to 5½ cents on the New York Central?

A. Well, just partially.

Q. Have you lost some business to the people on the New York Central?

A. Possibly some.

Q. You don't know how much?

A. No, I don't.

Q. Do you feel that there is any impact on this rate in the future for you if it should become permanent?

[fol. 619] A. Well, as it is now, our rail rate, we don't have any interest, don't amount to anything. It is our river rate takes care of everything.

Q. Can you still do business at the river?

A. Yes.

Q. Can anybody draw business away from you to the New York Central from your territory?

A. They could.

Q. Do they?

A. A certain distance they do.

Mr. Erickson: That is all the questions I have on this part.

Cross examination.

By Mr. Murphy:

Q. Is your elevator north of the river?

A. Yes.

Q. Is there a bridge across the river where your elevator is located?

A. Yes, sir.

Q. What is the area from which you draw corn?

A. Well, we are located in the valley, and we draw from both sides of the river, which is—

Q. How far south of the river do you normally go?

A. Five, six miles.

Q. And how far north do you go?

A. Approximately the same.

[fol. 620] Q. How far east of the crossing do you go?

A. Oh, about four miles, one way, a couple of miles the other way.

Q. The same distance west?

A. Maybe not quite as far west, a couple of miles west.

Q. I understand that 100 per cent of the corn that you sell at the river goes direct from the farm to the river elevator.

A. Yes, sir.

Q. Do you own your own trucks?

A. No, sir.

Q. Do your truck charges vary by the distance from the river?

A. Yes, sir.

Q. Do you lose any customers to New York Central elevators last year?

A. Not that I know of particularly, no.

Q. Was your business as good last year as it was the year before?

A. I should say just about the same.

Q. How far are you from the nearest New York Central elevator?

A. From Marsailles?

Q. Yes, sir.

A. Twelve, 15 miles, something like that.

[fol. 621] Q. How close to the New York Central do you get when you are at the most southern point of the area from which you draw corn?

A. About six miles.

Q. You come down—how far did you say you were away from the Central?

A. Marsailles is about 25 miles.

Q. From the New York Central?

A. Yes.

Q. You are 25 miles, and your trading area, you say, is about six miles south of the river.

A. Approximately.

Q. How close to the New York Central do you get with your trucks when you buy corn?

A. We have come within practically six miles of the New York Central.

Q. So you have gone down 18 miles.

A. It has gone farther than our regular territory. We have customers.

Q. On some occasions you have gone as far as 18 miles from your elevator to a point near the Central.

A. That's right.

Q. Have you ever gone south of the Central?

A. No, sir.

Q. Do you still have those same customers that you had [fol. 622] during 1956?

A. I would say no.

Exam. Dahan: Let us get this straight now.

I don't know whether you have the question correctly. I believe to a previous question you said you have lost no customers. Now he is asking you whether you have the same customers, and you say no. What is it? Have you lost any customers?

The Witness: You lose some, and you pick up some.

Exam. Dahan: I see. But you do have some of your same customers.

The Witness: Yes.

By Mr. Murphy:

Q. So far the 5½ cent rate hasn't affected you a bit, has it, Mr. Gage?

A. Not too much, no.

Q. Can you tell me how it has affected you if it has affected you?

A. Well, our river rate takes care of all the—as far as our rail shipping, we have no rail facilities; that is, as far as shipping out on rail, there is no incentive to ship by rail with our rate.

Q. The rail rate hasn't affected you, though, the New York Central's rail rate hasn't had any effect, has it, on your business?

A. Well, I think it has to a certain extent. Our south

[fol. 623] territory has been looking toward that rate pretty strong.

Q. You mean the points that would be 18 miles from Marsailles.

Mr. Murphy: That is all I have.

Mr. Erickson: No redirect.

Exam. Dahan: You are excused, Mr. Gage.

(Witness excused.)

Exam. Dahan: Call your next witness.

Mr. Erickson: That is all I have to offer.

Exam. Dahan: Are you going to have any more of these country dealers?

Mr. Erickson: There was to be one other party here, but I don't see that he has put in an appearance, Mr. Farlow from Bloomington, Illinois.

Exam. Dahan: That is all the country—

Mr. Erickson: That is all we have.

Exam. Dahan: We will recess until a quarter of 2:00, one hour.

(Whereupon, at 12:45 p.m., a recess was taken until 1:40 p.m. of the same day.)

[fol. 624] AFTERNOON SESSION 1:45 p.m.

Exam. Dahan: Come to order, please.

Are you ready to proceed, Mr. Hayes?

Mr. Hayes: Yes, sir.

Exam. Dahan: Call your next witness.

Mr. Legg: It was our understanding Mr. Freeman had a witness he wanted to get out of the way.

Mr. Hayes: We will let Mr. Freeman go first then.

Mr. Freeman.

LESTER BREHMAN was sworn and testified as follows:

Direct examination.

By Mr. Freeman:

Q. Will you give your full name and address, please.
A. Lester Brehman, Streator, Illinois, Route 5.
Q. Do you own and operate a grain elevator?
A. I do, yes.
Q. Where is it located?
A. Four miles north of Streator on the Burlington.
Q. What is the name of the station?
A. Richards Station.
Q. What is the capacity of your elevator?
A. Twenty thousand bushels, approximately.
Q. Do you buy and sell grain at your elevator?
A. I do.
[fol. 625] Q. How many employees do you have?
A. One steady and two part-time.
Q. How long have you operated this elevator at Richards Station?
A. Since September 1953.
Q. To whom do you market corn?
A. To Payne Stottler, Cargill, and Norris at Ottawa, Glidden and Continental at Seneca.
Q. How does the corn move that you sell to Payne Stottler?
A. By rail.
Q. That would be the Burlington?
A. By the Burlington.
Q. How far are you from the river stations to which you sell?
A. About 12 miles to Ottawa and about 22 to Seneca.
Q. On what basis do you sell to the river elevators?
A. Pardon?
Q. On what basis do you sell, delivered basis?
A. Both. Yes, delivered. Yes, that would be it.
Q. Delivered to the river elevator.
A. That's right.

Q. Are you familiar with the reduced rate that the New York Central has put in on the Kankakee Belt?

A. Yes, I am.

Q. What effect did that reduction have on your business?

[fol. 626] A. Well, it had quite an effect in decrease in business.

Q. Do you have some comparative figures for 1956 and 1957?

A. Well, no, not too good. I do have some.

Q. Will you give us the figures that you have for 1956 and 1957?

A. In 1957 it was 131,931 bushels.

Mr. Hayes: Of corn?

The Witness: Corn.

Mr. Hayes: Free corn.

The Witness: Free corn.

By Mr. Freeman:

Q. What is the figure for 1957?

A. 89,410.

Q. That reflects a reduction of how many bushels?

A. Well, that would be, looks like about 42,000 bushels.

Q. Are your purchases for sale both to the river and via the Burlington affected by the reduction on the New York Central?

A. They are, yes.

Q. From what area do you purchase corn?

A. Well, it would be about an area of about 2½ to 3½ miles from the elevator.

Q. Do you compete with any elevators on the New York Central in the purchase of corn?

[fol. 627] A. Well, I try to.

Q. What elevators do you try to compete with in the purchase of corn?

A. Well, it would be at Budd and Missal and Milla.

Q. Do you compete with any one at Streator?

A. Yes. I have heard of—yes.

Q. Whom do you compete with at Streator?

A. Well, it would be Barrett.

Q. Is that Isaac Barrett, who was mentioned this morning?

A. Isaac Barrett, yes. Did you want me to put on the map where this—

Q. Yes, it might be helpful if you would indicate.

Mr. Freeman: Let the record show that Richards Station is circled.

I have no more questions.

Cross examination.

By Mr. Murphy:

Q. Do you also compete with other elevators than those that you mentioned?

A. I do, yes.

Q. On the corn that you sell for delivery at the river, the delivered corn, do you handle that corn direct from the farm to the river?

A. I would say about half of it would go direct from the farm to the river or somewhere in that—possibly a little more comes into the elevator than goes direct to [fol. 628] the river.

Q. How much of the corn that you handled in 1956 moved by rail, the free corn?

A. Yes. I don't just exactly have the bushels, but I—

Q. It is a small proportion?

A. I believe it was around 48 carloads in 1956, and in 1957 it was twelve carloads.

Q. Do you handle CCC corn?

A. I did. In 1956 I believe it was around or approximately 42,000, and in 1957, 71,000.

Exam. Dahan: You are talking about bushels?

The Witness: Bushels.

By Mr. Murphy:

Q. Why do you handle 50 per cent of your corn direct from the farm to the river?

A. Well, they have their own trucks, a good many of

them, and they seem to think that they do get more if they haul it direct to the river. It does net them a little more.

Q. Have you ever had it sent direct to the river yourself where there has been no request from the farmer?

A. Well, I did once, I believe; yes.

Q. How far from the Missal elevator are you?

A. I would say it is about twelve miles.

Q. You indicated your normal area has a radius of 2½ to 3 miles.

[fol. 629] A. Yes.

Q. Is that something unusual when you would be competing with Missal, that distance?

A. Yes, I believe so. Three and a half miles, say, east; then it would start to get into Mr. Funk's territory, understand. Of course I may have bought corn that was in his territory before this New York Central lower rate went into effect.

Q. Well, to the extent you felt the competition from Missal, that was on a farmer that was considerably beyond the normal area from which you draw.

Mr. Freeman: I might ask you to clarify, when did you feel this competition he is talking about?

The Witness: Well, it wasn't too much before last year. I didn't really notice it much in December of 1956, because I don't think the word had got around, you might say, that my customers really knew too much about it.

By Mr. Murphy:

Q. My question now is this, the competition that you felt from Missal since this 5½ cent rate has been in effect has been mostly at customers that were beyond the normal area from which you draw corn.

A. No, no; they were within, say, two miles of me and possibly nine or ten miles from Missal.

[fol. 630] Q. Do you compete with the elevator at Grand Ridge?

A. I do.

Q. Does your area extend north about midway between Richards—

A. No, not quite. No, I believe that they come down closer to my territory than I go up into theirs. That is, I don't get very much corn, say it is halfway up to Grand Ridge, two miles. Most of mine would be closer than that.

Q. The witness that testified, the manager of the elevator at Grand Ridge, introduced figures that showed that his business in 1957 went up over 1956. Did you feel any increased competition from him?

A. Well, no, I don't believe that I noticed so much loss due to their end.

Mr. Freeman: I didn't hear the finish of your sentence. What did you—

The Witness: I don't believe that my loss would be to their gain. But as I look through my records of individual, I see that some of them haven't sold me anything last year, where heretofore they had, and they were farther from Grand Ridge than I was, you might say. So I felt that corn must have went the other way.

Mr. Murphy: That is all I have, your Honor.

[fol. 631] Exam. Dahan: You are excused.

(Witness excused.)

Exam. Dahan: Next.

Mr. Hayes: Mr. Gally.

Exam. Dahan: If you have any more witnesses for this afternoon, we will swear them at one time.

(Witnesses sworn.)

GLEN GALLY was sworn and testified as follows:

Direct examination.

By Mr. Hayes:

Q. Will you state your full name, Mr. Gally?

A. Glen Gally.

Q. Where do you live, sir?

A. Mazon.

Q. With what company are you connected?
A. Mazon Farmers Elevator.
Q. What is your connection with that company?
A. Assistant manager.
Q. How long have you been connected with that company?
A. Five years.
Q. You referred to that as a farmers' elevator. What is its organization?
A. It is a co-op.
Q. A farmers' co-op?
[fol. 632] A. Yes.
Q. How many farm members did it have in 1956, sir?
A. Between 900 and a thousand, I would say.
Q. Does it operate a grain elevator?
A. Yes.
Q. At Mazon?
A. Yes.
Q. What is the capacity of that elevator?
A. Between 60, 65,000.
Q. How many employees does the farmers' co-op at Mazon that you are connected with have?
A. Eight.
Q. Is its elevator located on any railroad?
A. Santa Fe.
Q. Do you know of this 5½ cent New York Central rate?
A. Yes.
Q. What effect, if any, has that had on the business of your company, sir?
A. It has had quite a bit.
Q. Has it helped it a lot, or how is the fact?
A. No, it didn't help it a lot.
Q. What did it do to it?
A. Decreased it.
Q. Can you give me the comparison between the bushels of free corn that your company handled the first eight [fol. 633] months of 1956 and the corresponding period in 1957?
A. Yes,
Q. Give me first the number of bushels your company handled of free corn for the first eight months of 1956.
A. 467,951.

Q. Now the number of bushels of free corn that your company handled in the first eight months of 1957?

A. 350,564.

Q. Where did that corn go that you didn't get in 1957?

A. Went south of our elevator.

Q. When you say it went south of your elevator—

Mr. Murphy: I object. What corn he didn't get, I am sure he doesn't know where it went. Which corn that he had, he would know where it went.

Mr. Hayes: Maybe he does know. He said he did.

By Mr. Hayes:

Q. When you say it went south of your elevator, to what do you refer, to what place?

A. Dwight.

Q. For a shipment east to Chicago.

A. Right.

Q. What elevator—

Mr. Murphy: I object to that, Your Honor. The record already shows that the movement was through Kankakee and not through Chicago, so when Mr. Hayes is leading his witness like that, he ought at least to stick to the facts.

[fol. 634] By Mr. Hayes:

Q. Well, movement eastbound from Dwight, put it that way.

A. Right.

Q. What elevator in Dwight is located on the New York Central rails?

A. Dwight Farmers.

Q. Is that the shipping elevator that got that difference?

A. That's right.

Q. Since this 5½ cent New York Central rate went into effect has any corn been shipped east from your elevator, free corn, that is, by Santa Fe?

A. No.

Q. How far are you from Dwight, speaking of your elevator?

A. Nine miles.

Q. How far to the near east river elevator?

A. Nine miles.

Q. Are you north or south of the New York Central?

A. North.

Q. What is the truck rate from your elevator to the river?

A. Three cents.

Q. To what stations on the river do you ship when you [fol. 635] ship to the river?

A. Norris, Cargill, and Continental.

Q. Are those the names of the companies that own the elevators?

A. Right.

Q. At what places are those three elevators located?

A. Morris and Seneca.

Q. Referring to the harvest season in 1957, were there any weather conditions that delayed harvest?

A. Yes.

Q. What happened?

A. Late planting.

Q. Was the harvest delayed?

A. Harvest delayed.

Q. And you are saying that in comparison with 1956, I suppose.

A. Yes.

Q. In 1956 was there any such delay?

A. No.

Q. Do you ask the railroad on which your elevator is located to reduce its rates on corn eastbound to compete with the New York Central?

A. Right.

Mr. Murphy: Objection, your Honor. That is completely immaterial, what he asked some other railroad to do. [fol. 636] We are talking about a New York Central rate now.

Mr. Hayes: Had you finished?

Mr. Murphy: Yes.

Mr. Hayes: A rate that is calculated to break down the

rail rate structure all the way on either side is a rate that is interesting for that reason, as well as others.

Exam. Dahan: Objection overruled.

Mr. Legg: Did you answer the question?

Mr. Hayes: He answered "Right."

Exam. Dahan: Did you answer?

The Witness: Right.

By Mr. Hayes:

Q. That was since this 5½ cent rate went into effect.

A. Right.

Q. Is your situation, sir, in the accumulation of grain—in the accumulation of corn getting any better?

A. No.

Q. Is it getting any worse?

A. Yes.

Q. Is the news of this 5½ cent rate penetrating further and further into the consciousness of farmers around there?

A. It seems to be.

Mr. Hayes: You may ask.

[fol. 637] Exam. Dahan: You may inquire, Mr. Murphy.

Cross examination.

By Mr. Murphy:

Q. What percentage of the 467,000 bushels your elevator handled during the first months of 1956 moved via the river?

A. What percentage of it? All of it.

Q. Is the same true for your 1956 figures?

A. Yes.

Mr. Hayes: You asked him about the 1956 figures.

By Mr. Murphy:

Q. 1957 figures. Excuse me.

Exam. Dahan: I would like to have counsel either direct their questions to the witness or any matter that they have to say directed to the examiner.

Mr. Hayes: Mr. Examiner—

Exam. Dahan: We have too much consultation between counsel going on the record.

Mr. Hayes: Is the record clear to your satisfaction on the present point?

Exam. Dahan: Yes, it is clear. I mean, in the future.

By Mr. Murphy:

Q. Is the same thing true for the 1957 period?

A. Right.

Q. Has that generally been true, that all of your corn has moved to the river?

[fol. 638] A. Yes. Most all our corn has moved to the river.

Q. Can you tell me what percentage of the corn that you handle moves direct from the farm to the river?

A. Practically all of it.

Q. Does any of it go through your elevator?

A. No.

Q. Do you have the figures for the full years 1956 and 1957?

A. No, I haven't.

Q. You indicated that the news was getting to the farmers, the fact they could get rail bids on the New York Central, is that correct?

A. That is correct.

Q. What is the effect of that? They are asking for a higher bid now from you?

A. Right; right. To compete, yes.

Q. They want you to go up above what you had been, is that right?

A. Right.

Mr. Murphy: Thank you. That is all I have.

Exam. Dahan: Redirect?

Mr. Hayes: No.

Exam. Dahan: You are excused, thank you.

(Witness excused.)

[fol. 639] DALE TREASURE was sworn and testified as follows:

Direct examination.

By Mr. Hayes:

Q. Will you state your full name, please.
A. Dale Treasure.
Q. In view of the air conditioning noise, if you can keep it in mind to hold your voice up, everybody will appreciate it. Where is your home?
A. Gardner, Illinois.
Q. Gardner, Illinois?
A. Yes, sir.
Q. Are you connected with the grain business there?
A. Yes, sir.
Q. What is the name of the company?
A. Treasure Grain Company.
Q. Who owns that company?
A. My father, Charles Treasure.
Q. What is your connection with it, sir?
A. Assistant manager.
Q. Does it own an elevator?
A. Pardon?
Q. Does that company own an elevator?
A. Yes, sir.
Q. What is the capacity of the elevator storage?
A. About 25,000.
[fol. 640] Q. How long has it been located where it is?
A. Well, we have had it for 27 years, and it has been there, I don't know how long before that. I really don't know.
Q. And it is located at Gardner.
A. At Gardner, yes, sir.
Q. How close is the nearest elevator on the New York Central Lines to your elevator at Gardner?
A. Four and one-half miles.
Q. In which direction?
A. South.
Q. How close is the nearest elevator on the river to where you are?

A. Nineteen miles.

Q. And at what point?

A. Morris.

Q. And in which direction?

A. North.

Q. So you are located between the New York Central and the river.

A. Yes, sir.

Q. Four and one-half miles from the New York Central and 19 miles from the river.

A. Yes, sir.

Q. What is the name of the elevator on the New York [fol. 641] Central that is south of you?

A. Nielsen Grain Company.

Q. The Nielsen Grain Company.

A. Yes, sir.

Q. At what point is that located?

A. At Blair.

Q. What is the truck rate to the river from your elevator?

A. Three and three-quarters.

Q. Three and three-quarters cents a bushel.

A. Yes, sir.

Q. You are familiar with this 5½ cent New York Central rate?

A. Yes, sir.

Q. What effect has that had on the elevator business with which you are connected?

A. Well, it has hurt our business, and if it keeps it up, we will just be out of business.

Q. Do you have any comparative figures for the first eight months of 1956 and the first eight months of 1957?

A. Yes, sir.

Q. Would you give me, please, the volumes of free corn handled through your elevator in the first six months of 1956 and the first six months—I beg your pardon—eight months, the first eight months of 1956 and the first eight months of 1957, respectively.

[fol. 642] A. 1956 would be 198,402 bushel, and 1957 is 148,141 bushel.

Q. That seems to be a difference of something in excess of 50,000 bushels.

A. Yes, sir.

Q. That was corn?

A. Corn, yes, sir.

Q. Free corn?

A. Yes, sir.

Q. Where did that 50,000 go?

A. Well, that went through—I would say just about all of it went to Blair. Now some of that went to Dwight. Dwight has a farmers' elevator in Gardner, just a block down the street from us, and they bid New York Central track. Then they haul that going down to Dwight.

Q. I see.

A. So we are not hurt in Blair; we are hurt right in Gardner.

Q. What is the name of this elevator that has the branch in your town and its headquarters in Dwight?

A. That is the Farmers' Elevator, Dwight Farmers' Elevator.

Q. If I understand you right, they buy corn in your area—

A. They bid Dwight New York Central track down at [fol. 643] their elevator right in Gardner.

Q. I see. The New York Central track price.

A. Yes.

Q. I think you said they trucked it down to Dwight then.

A. Yes.

Q. And elevated it there and loaded it on to a freight car to go east from Dwight.

A. Yes, sir.

Q. That is interesting.

Now, has there been recently, to your knowledge, since this 5½ cent rate went into effect is what I mean by "recently"—have there been purchases of grain for shipment east on the New York Central from farmers located north of you?

A. Yes, sir.

Q. About how far did that corn that was bought north of you have to go by truck to get to the New York Central.

Mr. Murphy: I am going to object to this testimony about what someone else did, a transaction that took place between some unnamed person and a farmer—

Mr. Hayes: We will name them. I can only ask one question at a time.

Mr. Murphy: I object to it whether you name them or [fol. 644] not on the grounds that it is hearsay. This witness certainly isn't competent to be able to describe the business transactions of other people to which he was not a party.

The Witness: I have proof.

Mr. Hayes: Just a minute. This is just our fight, not a free one. This witness is a grain dealer in that territory and any grain dealer in that territory that doesn't know where his old customers are shipping their grain is out of business for other reasons than rail rates. He knows the course of his business.

Exam. Dahan: I will let him answer.

Mr. Hayes: Will you please read him the question.

(Question read.)

The Witness: Nine and one-half to 10 miles.

By Mr. Hayes:

Q. Was that free corn?

A. Yes, sir.

Q. Has there been recently an advertising campaign by dealers on the New York Central to publicize this 5½ cent rate?

A. Yes, sir.

Q. Tell me about that?

A. Well, there is not much to tell except that when that come out in the paper, we might as well shut our doors almost.

[fol. 645] Q. Were these paid advertisements?

A. Pardon?

Q. Were these paid advertisements?

A. Yes, sir.

Q. Is this situation in which you find yourself with respect to the accumulation of grain—strike that—accumulation of corn getting better or getting worse?

A. It is getting worse.

Q. Have you and your father talked that situation over together and come to a conclusion as to whether you will be able to stay in business if this 5½ cent rate continues permanently?

A. Yes.

Mr. Murphy: I object, your Honor, as to whether—

By Mr. Hayes:

Q. And do you expect to stay in business if that rate continues permanently?

A. No, sir.

Q. Referring, Mr. Treasure, to the 1957 corn harvest, was that harvest delayed for any cause?

A. Yes.

Q. What was it?

A. Well, it was a late year, wet. They couldn't plant it in time. It was late, a wet year.

Mr. Hayes: You may ask.

[fol. 646] Cross examination.

By Mr. Murphy:

Q. What is the normal radius within which you draw corn?

A. Oh, 5½, 6 miles, all the way around.

Q. All the way around.

A. North, south, east, and west.

Q. That means you draw south of the New York Central normally?

A. Yes. We were there, that was the reason.

Q. Prior to the time the rate became effective you drew corn south of the New York Central—

A. No, sir.

Mr. Hayes: He already said so. I object to the repetition.

Mr. Murphy: He just denied it.

Mr. Hayes: He didn't deny it.

The Witness: This was before.

By Mr. Murphy:

Q. I am going to ask it once again. Prior to December 15, 1956 did you draw corn from the area south of the New York Central Railroad?

Mr. Hayes: I object to that as asked and answered.

Exam. Dahan: Overruled.

The Witness: Prior to 1956.

By Mr. Murphy:

Q. Yes.

A. A little, yes, sir.

[fol. 647] Q. What percentage of the corn that you handled during the first eight months of 1956, being 198,000 bushels, did you handle to the river?

A. From south of—

Q. You testified that you had handled 198,000 bushels of corn during the first eight months of 1956. How much of that went to the river?

A. That was practically all of it. Maybe 1 or 2 per cent didn't go to the river.

Q. Is the same thing true of the business that you handled in 1957?

A. Yes, sir.

Q. What percentage of the 198,000 bushels that you handled during the first eight months of 1956 moved direct from the farm to the river without being elevated through your elevator?

A. Well, I would say 98 or 99 per cent.

Q. So therefore 98 or .99 per cent of the business that you handled in 1956 you handled as a merchandiser, is that correct?

A. Yes, sir.

Q. And your elevator facilities were not used on any of that business?

A. On some of that, on tail-end of jobs.

Q. On the 2 per cent, you mean.

A. That would be the tail end of a job. Sometimes you [fol. 648] can't take it to the river, you can't haul a truck over there with 50 bushel on it, so we dump it in the elevator. Some of that comes in for feed in the elevator.

Q. Well, on the business that comes in for feed and is used locally this rate is not a factor, is it?

A. Not in that, no, sir.

Q. Is the truck rate from the point south of the New York Central to Morris?

A. No, this south of the New York Central, we have one farm south, and we didn't buy the corn last year, in 1957.

Q. Let us take a point 4 miles south of Gardner, a farm there, and assume that you are trucking corn from that farm to Morris, Illinois?

A. There and three-quarters cents a bushel.

Q. What is your truck rate from a point six miles north of Gardner?

A. Six miles north? Three and a quarter cents a bushel.

Q. It would be less farther north.

A. Yes.

Q. What would the truck rate from that point six miles north of Gardner be to Blair?

A. I can't answer that. I don't know.

Q. You mentioned that the Dwight Farmers Elevator—[fol. 649] am I correct in understanding that you said that the Dwight Farmers' Elevator has an operation at Gardner?

Mr. Hayes: Where?

Mr. Murphy: Gardner.

Mr. Hayes: Oh, yes.

By Mr. Murphy:

Q. Have they had that operation there for a long time?

A. That has been there as long as I can remember. I don't know how long. That has been there a good twenty years, twenty-five years.

Q. You mentioned a few instances of corn moving from north of Gardner down to Blair, I believe it was, in your direct testimony. Was that isolated cases?

A. How was that again?

Q. You mentioned corn moving 9½ miles from an area north of you down to the New York Central elevator. Were those isolated situations, sir?

A. That just come in after this notice in the paper.

Q. That was just one situation, is that right?

A. That is the only one I know of, yes, sir, that far north.

Mr. Murphy: That is all I have.
Exam. Dahan: Redirect.

Redirect examination.

By Mr. Hayes:

Q. You mentioned a feed business there. Is it possible [fol. 650] to continue your feed business, Mr. Treasure, if you don't have this elevator enterprise and business there?

A. It is very doubtful. We have been grinding feed there now for—well, since 1931, and you just can't stop grinding feed and start selling the commercial feed because the farmers will go right down the street for it, so that quashes that right there.

Q. If I understand you, it is necessary to have the elevator and the elevator business in order to continue the feed business?

A. Feed business, yes, sir.

Q. So your expectation of discontinuing the elevator business includes an expectation of discontinuing the feed business.

A. It means that and fertilizer and everything else.

Mr. Hayes: That is all.
Exam. Dahan: You are excused.

(Witness excused.)

Exam. Dahan: Next.
Mr. Hayes: Mrs. Bookwalter.

Mrs. Eda Bookwalter was sworn and testified as follows:

Direct examination.

By Mr. Hayes:

Q. Mrs. Bookwalter, will you please state your name [fol. 651] to the reporter?

A. Eda Bookwalter.

Q. Where is your home?
A. Braceville, Illinois.
Q. Are you connected in any way with an elevator business?
A. Yes.
Q. What is the name of the company?
A. Bookwalter Grain Company.
Q. Does it own an elevator?
A. Yes.
Q. Where is the elevator located?
A. Essex, Illinois.
Q. Is that north or south of the New York Central?
A. North.
Q. About how far north from the near east—
A. About seven miles.
Q. From the near east New York Central station?
A. Seven miles.
Q. What is that New York Central Station?
A. Union Hill Farmers.
Q. About how far from the river?
A. Twenty-eight miles.
Q. So you are located between the New York Central and the river.
[fol. 652] A. Yes.
Q. Who is the owner of the elevator with which you are connected?
A. Ira J. Bookwalter, my husband.
Q. What is your connection with that business?
A. I take care of the office and the books.
Q. How long has that elevator been there?
A. Oh, as long as I can remember. That is quite a long time.

Mr. Hayes: I shall advise the witness to resort to her constitutional privilege.

By Mr. Hayes:

Q. What is your truck rate to the river?
A. Four cents.
Q. When you say "to the river," to what points on the river?

A. You mean the elevators on the river? At Morris, Illinois. They are Norris Grain, Cargill, Inc., Illinois Grain Terminals, and Continental Grain.

Q. And have you from time to time sold grain to all of those elevators?

A. Yes.

Q. What points on the river are those several elevators located?

A. All at Morris, Illinois.

Q. Do you have knowledge of this 5½ cent rate the New [fol. 653] York Central put in?

A. Yes, I do.

Q. What has that done to the business of your company, Mrs. Bookwalter?

A. It has decreased the business enormously.

Q. Do you have some figures there that will show us the comparison between the volume of free corn handled by your elevator in the first eight months of 1956 and the corresponding period of 1957?

A. We had from January 1 to August 31, 1956, 177,231 bushels, and January 1, 1957 to August 31, 1957, 140,873 bushels.

Q. Has there been an advertising campaign that has come to your attention to publicize this New York Central—

A. Yes, there has.

Q. —rate? I show you what purports to be a newspaper advertisement—

A. Yes, that's right.

Q. What publications did that appear in?

A. Gardner Chronicle, printed in Gardner, Illinois; the Emington Journal, printed in Emington, and the Essex West Side Telephone, which is our little paper from our little town, that I know of for sure.

Q. Could you give us approximately the dates between which that advertisement appeared in those papers?

[fol. 654] A. The first time it appeared that I saw it was a week ago last Thursday.

Q. Have you seen it again since then?

A. Yes, I have seen it in the same papers since then.

Q. Will you read that advertisement into the record, please, Mrs. Bookwalter?

A. You want the whole—
Q. Yes, if you please.

Mr. Murphy: I haven't seen this, and I don't think—

Mr. Hayes: I offered it to you, counsel. If you want to look at it, you are quite welcome to do so.

Mr. Murphy: You waved something around the room. I didn't recognize it as an offer. Thank you, though.

Nielsen Grain Company is not a party to this proceeding, so I object to this. I don't know what—I don't know under what rules of evidence you attempt to introduce it.

Exam. Dahan: You may read it.

Mr. Murphy: I have an objection pending.

Exam. Dahan: All right. After she gets through reading it, if you want to have it stricken from the record, we will consider it then.

The Witness: "We are now selling grocoated mangledorf seed, also Lester Pfister seed corn. We have a lower [fol. 655] freight rate on corn here. Our scale of moisture discount is 1 cent for each ½ of 1 per cent moisture over 15.5. Come in and see us for better price, Nielsen Grain Company, Blair, Illinois. Post Office, Reddick, Illinois."

By Mr. Hayes:

Q. How far is Blair, Illinois from your—
A. About—

Mr. Murphy: I have an objection pending.

Exam. Dahan: The objection is overruled.

The Witness: About 13 miles by good road, I would say, trucker's road.

Mr. Hayes: Off the record.

(Discussion off the record.)

By Mr. Hayes:

Q. Is your situation, referring to the situation of the business with which you are connected, in the accumulation of corn getting better or getting worse?

A. It is getting much worse as the advertisement came out.

Q. Does the proprietor of the business with which you are connected expect to continue doing business—

A. No.

Q. —if this rate becomes a permanent one?

A. No, he couldn't.

Q. I think you said this elevator with which you are [fol. 656] connected is located at Essex, Illinois.

A. That is true.

Q. Do you know of instances since this rate went into effect, this 5½ cent rate, in which free corn has moved from farms north of Essex by truck, south past Essex, to the New York Central Railroad for shipment eastbound?

A. Yes.

Q. Can you give me an example of that?

A. Yes. Just three days ago, one instance, there was a truck that was sent down by—shall I mention Nielsen Grain —Nielsen Grain to a farm east and north of Essex that became lost and came back to Essex to ask the direction to get to the farm, and apparently thought that they had bypassed it. Instead they hadn't gotten to it yet. They were within two miles of it and turned all the way back and came to Essex. We had to direct them to this place which was about between 7 and 8 miles farther on from Essex, to the north and east.

Mr. Hayes: I think you may ask.

Mr. Murphy: Thank you.

Cross examination.

By Mr. Murphy:

Q. That instance of the lost truck is the only such situation that you are aware of, isn't it?

A. Of being lost, but not of getting corn. There are [fol. 657] others.

Q. Can you tell me how much of the 177,000 bushels you handled during the first eight months of 1956 moved to the river?

Mr. Hayes: What was the figure?

The Witness: All of it.

Mr. Murphy: 177,000.

By Mr. Murphy:

Q. Is that figure correct?

A. 177,231, all that was delivered to market was sent to the river.

Q. How much of that that moved to the river moved direct to the river from the farm without elevation at your elevator?

A. Most of it. I wouldn't—I could tell you on a yearly basis just exactly how much didn't move over to the river or how much had gone through the elevator, but—

Q. I am satisfied with your answer.

A. Yes. Most of it does.

Q. Is the same thing true in regard to the 1957 movements?

A. Yes.

Q. What you do elevate is what is used for feed, I assume.

A. Sometimes we get overloaded, and we take a load [fol. 658] or so to the river, but we do use some for feeds.

Q. It would only be when you have corn you don't want to use for feed that you might truck it from the elevator to the river.

A. That is true.

Q. Otherwise it moves direct from the farm to the river.

A. Yes.

Q. You indicated you saw this advertisement for the first time last Tuesday, is that correct?

A. A week ago Thursday. The paper comes out on Thursday.

Q. The paper comes out on Thursday.

A. Wednesday afternoon, and we get it Thursday.

Q. That was the first time that came to your attention.

A. That was the first time I had seen it.

Q. You indicated business had become worse since that came out?

A. Yes. If you want me to explain that, the farmers that come into the elevator talked about it when it came out in the paper, and before that they didn't because some of them hadn't come in contact with that, because most of our customers generally come to our elevator to do their business, and if they are good customers, they don't shop

around, and in other words, when that came out in the paper they had an opportunity to see what was going on, [fol. 659] and a good many of them, of course, will take advantage of that.

Q. Now they want a higher bid than you have been giving them, is that correct?

A. It is higher than we can pay.

Mr. Murphy: Thank you. That is all.

Mr. Hayes: That is all.

(Witness excused.)

Exam. Dahan: We will have a five-minute recess.

(Short recess.)

Exam. Dahan: Come to order, please.

Mr. Freeman: Mr. Dewey.

Exam. Dahan: We have an appearance here.

Mr. Farlow, do you desire to enter an appearance at this time?

Mr. Farlow: Yes.

Exam. Dahan: Give the reporter your name and address, and indicate whether or not you have appeared before the Interstate Commerce Commission.

Mr. Farlow: My name is Laurence Farlow. Address is 521 McGregor Street, Bloomington, Illinois.

Exam. Dahan: You are appearing in whose behalf?

The Witness: On behalf of the Farmers Grain Dealers Association of Illinois.

Exam. Dahan: Are you an officer of that organization? [fol. 660] Mr. Farlow: I am.

Exam. Dahan: Very well, sir. Your appearance may be entered. Do you desire to make a short statement at this time?

The Witness: I do.

LAWRENCE FARLOW was sworn and testified as follows:

Direct examination.

The Witness: My name is Lawrence Farlow. My address is 521 McGregor Street, Bloomington, Illinois.

I am employed as secretary of the Farmers Grain Dealers Association of Illinois; address, 230 Unity Building, Bloomington, Illinois.

One of my duties is to handle traffic problems for about three hundred Farmers Cooperative Elevator Companies with grain loading facilities at about four hundred railroad stations in Illinois. These grain loading facilities were originally designed to receive grain from farm wagons and trucks, assemble the grain in carload lots and load it out into railroad cars for shipment by rail.

Since all country grain elevator operators in a given area must base their bids to producers on the price at the most advantageous terminal market less transportation costs, we believe that each country elevator operator having rail [fol. 661] loading facilities is entitled freight rates that are fairly competitive with rates from stations on other railroads in the same general area. It is also desirable that railroad rates in any general area be fairly competitive, with the cost of other forms of transportation.

Soon after the New York Central published a 5 cent rate for corn to Kankakee from stations on its line as far west as Moronts, Illinois we received complaints from our member companies located on the Illinois Central, the GM&O, and the CB&Q, advising that their competitors on the NYC were bidding as much as—

Mr. Murphy: I am going to object to this testimony as to what somebody told him, because I have no opportunity to cross examine and determine the basis for such statements. It is hearsay.

Exam. Dahan: Overruled. Continue.

The Witness: —4 cents per bushel for corn more than they could bid on the basis of rates applicable on their railroads; and that as a result of the disparity in rates it was necessary for them to abandon corn loading operations through their established facilities.

We advised them that we would discuss the matter with the traffic officers of the railroads on which they were located and ask them for competitive rates. Since grain [fol. 662] prices in that general area are based on the Chicago market we suggested to the competing railroads that they publish competitive rates to Chicago. The traffic officers on a number of the competing railroads assured us that they were willing to consider the publication of rates low enough to meet the truck and barge competition, but they could not justify rates as low as that published by the New York Central.

Mr. Murphy: I object to this, your Honor, and I ask that that be stricken. That is certainly not something within the competence of this witness, and I am at a complete loss on cross examination. He is testifying about the truth or falsity of the statements that were made. It is clearly hearsay, and I think it is objectionable.

Mr. Chartrand: Mr. Examiner, if I understand this statement correctly, those were the statements made to this man by the railroads. That he knows.

Exam. Dahan: Objection overruled. You may continue.

The Witness: It is our observation that the rail carriers in this general area have been losing an increasing volume of corn year after year to truck and barge competition. We believe the affected railroads should seek a level of rates that would be competitive with the truck-[fol. 663] barge cost of transportation.

Such rates should be fairly competitive among railroads to preserve tranquility in the country grain elevator industry. A competitive rate for corn from any station in Illinois to Chicago, and to industries in the Chicago switching district, must have proportional application to be effective. Rail carriers should be granted such Fourth Section relief as may be necessary to enable them to compete with traffic on the Illinois Waterway.

Exam. Dahan: Do you have any questions, Mr. Chartrand?

Mr. Chartrand: Yes, one.

By Mr. Chartrand:

Q. Then, Mr. Farlow, if I understand your statement correctly, you feel here that the New York Central or a railroad should have Fourth Section relief to meet a competitive situation, but on the other hand, it should be on a fair competitive level, is that correct?

A. Yes, that is my opinion.

Mr. Chartrand: Thank you.

Exam. Dahan: Do you have any cross examination, Mr. Hayes?

Mr. Hayes: Well, I shall have some of the witness.

Exam. Dahan: Very well. It is your turn.

[fol. 664] Cross examination.

By Mr. Hayes:

Q. Do you think the 5½ cent rate is a fair competitive level?

A. It is not competitive with rates on other railroads in that general area.

Q. Because it is too high or it is too low?

A. It is lower than rates on other railroads.

Mr. Hayes: That is all.

By Mr. Murphy:

Q. The reason you think that the 5½ cent rate may be too low is because it is solely based on the comparison—

Exam. Dahan: I don't think he said it was too low.

Mr. Hayes: Didn't he?

Exam. Dahan: No, he said it was lower than other railroads.

Mr. Murphy: I am satisfied with that.

Exam. Dahan: Isn't that your statement?

The Witness: That is what I said.

Exam. Dahan: You didn't make any statement as to whether the rate was too high or too low, you just said in comparison with the other rail rates that it was lower.

The Witness: I haven't made a study of the cost of transportation, and I am not prepared to say that it is too low.

[fol. 665] Mr. Hayes: I didn't understand his answer.

Exam. Dahan: That is how I understood him, that he wasn't concerned with the compensatory character of the rate at all. He just said it was lower than the rates of other rail carriers.

Mr. Hayes: I didn't understand his answer.

Exam. Dahan: Very well.

By Mr. Hayes:

Q. I didn't ask you that, sir, as a cost expert, understand, at all.

A. No.

Q. If you so understood me, I will have to ask again. You have considered a competitive situation, however.

A. I have.

Q. What I am asking about, from the standpoint of the competitive situation, is this 5½ cent rate too high or too low?

A. Well, it is lower than the rate on other railroads and low to the extent that it is causing some very embarrassing situations among country grain dealers in that area.

Q. Because it is too high or too low?

A. Because it is lower than rates on other railroads.

Mr. Hayes: That is all.

By Mr. Murphy:

Q. Mr. Farlow, you have heard the testimony of some of the witnesses that have preceded you to the extent that [fol. 666] they didn't use the rails—at least some of them didn't use the rails for the movement of their corn and used the river. Did you consider that when you took a position in this case?

A. I don't believe I understand the question.

Q. You have indicated that there has been some disruption among country elevator operators. Is the practical effect of that disruption minimized by the fact that some of the country elevator operators use truck and barge exclusively and don't use rail?

A. Well, in certain locations that would be true.

Mr. Murphy: I have nothing further.

Exam. Dahan: That is all. Thank you. You are excused. You want to be excused from the hearing?

The Witness: Yes.

Exam. Dahan: You may be.

(Witness excused.)

Mr. Freeman: Mr. Dewey.

ROBERT DEWEY was sworn and testified as follows:

Direct examination.

By Mr. Freeman:

Q. Will you give your full name and address?

A. Robert Dewey, Henry, Illinois.

Q. With what business are you associated?

[fol. 667] A. W. W. Dewey & Sons, Inc., buying and selling grain, shipping grain.

Q. What is your business with W. W. Dewey, Inc.?

A. I am manager of the river loading plant at Henry, Illinois.

Q. Are you also an officer of the corporation?

A. I am secretary of the corporation, stockholder.

Q. Will you describe the river facilities of W. W. Dewey?

A. At Henry?

Q. Tell us where you have facilities first, please.

A. We have a river loading plant at Henry, 160,000 bushel capacity, and we also have a river loading plant at Pekin.

Q. How would you describe your elevator at Henry? Would you call it a subterminal elevator or a country elevator?

A. I think we would be classed as a subterminal elevator because we do buy from other country elevators.

Q. Is your elevator larger than the ordinary country elevator?

A. I think it would be considered somewhat larger than the ordinary country elevator.

Q. How long have you had the elevator, river elevator, at Henry?

[fol. 668] A. Since 1940.

Q. Where do you sell corn from your Henry elevator?

A. Well, we sell into Chicago, and some of our grain goes south.

Q. Over the years how would your volume north and south on the river compare?

A. I think over a period of years it would probably average out about half and half.

Q. Does that vary from year to year?

A. Yes, it does. According to the market, there are times when south is not in the market, and we have no opportunity to go that way.

Q. Is the Chicago market and the movement to Chicago important to your operation at Henry?

A. It is very important to us because it gives us a continuing market where we always have an outlet, through the south, as I mentioned before, it is kind of an off and on proposition. At times you can move considerable volume that way, but there are quite a few times when you can't move anything.

Q. From whom do you buy corn at your Henry elevator?

A. We buy from farmers in what we consider our normal trade area.

Q. What would that embrace?

A. Well, a territory halfway to the nearest elevator [fol. 669] in every direction.

Q. And just roughly what would that be?

A. Well, to the west would be about eight miles, south about five, north about three, and to the east, six or seven.

Q. Do you also buy from country elevators?

A. Yes, we do.

Q. Do you buy substantial quantities of corn from country elevators?

A. A good share of our volume is originated from country elevators.

Q. Is it necessary for you, in the operation of your river elevator at Henry, to buy from country elevators?

A. In operating a river loading plant we have to accumulate grain in substantial volume, barges run from 25 up to 50,000 bushel, and at times we have to have room to accumulate several barge loads because of the unavailability of transportation. Consequently, our facilities are of substantial size for—rather larger than a regular country elevator, and in order to get the volume that we need and to justify an elevator of that size, we find it necessary to buy from country elevators.

Q. I understand you feel that an elevator of that size is necessary to have a river operation because of the substantial size of barge.

[fol. 670] A. We couldn't operate our business with any less.

Q. Are you familiar with the issues in this proceeding in which the New York Central is seeking Fourth Section relief in the 5½ rate in Kankakee Belt West from Kankakee and shipment beyond?

A. Generally I am, yes.

Q. Do you oppose or support the application of the New York Central?

A. I oppose it.

Q. In your purchases of corn for your Henry elevator have you bought from country elevators on the New York Central?

A. Prior to the inception of the 5½ cent rate we bought what we thought was a very satisfactory volume from four stations on the New York Central.

Q. What stations are those?

A. McNabb, Priscilla, Lostant, and Milla.

Q. Since the December 15, 1956 rate change on the Kankakee Belt were your purchases from those elevators affected?

A. Quite a lot. For the period December 1955 through August 1956 we bought approximately 120,000 bushel from those four stations, and in the like period in the next year, that would be December of 1956 through August of 1957, that volume was cut to approximately 15,000. From [fol. 671] two of those stations, one that we had bought

about 40,000 bushel from the year before, we bought nothing, and another, just a very small amount.

Q. Do you feel that your operations at your Henry river elevator are adversely affected by this rate on the New York Central?

A. Yes, to the extent that we are losing that volume of business.

Q. Do you feel that you will be affected in your purchases from other points not on the New York Central in the future?

A. Well, we have—I know of several instances where grain has moved to New York Central loading points from customers that we ordinarily buy some grain.

Q. Do you feel that this will increase in the future?

A. If this rate stays the same, I feel that it will increase, and other stations that we buy from will, in order to protect themselves, take steps to either make arrangements to load through plants on New York Central points or put up temporary facilities of some kind to load grain.

Q. And this tends to draw the grain to the New York Central rather than to the river through your house.

A. That's right.

Mr. Freeman: That is all.

[fol. 672] Mr. Chartrand: May I ask a question?

By Mr. Chartrand:

Q. Going back to the time when you did business with McNabb, Priscilla, Lostant, and Milla, did those elevators located on the New York Central truck from those elevators over to your elevator on the river?

A. Some of it was trucked from the elevators, I believe, and some of it moved direct.

Q. Do you have any idea as to—

A. No.

Q. Would you say of your general business a goodly portion is trucked from other elevators to your elevator?

Mr. Murphy: He already stated he didn't know, counsel. I object to the question.

Exam. Dahan: Objection overruled.
Mr. Chartrand: I am talking about—excuse me.
The Witness: Would you—
Mr. Chartrand: If you know.
The Witness: What was that question, again?

(Question read.)

The Witness: Well, a good part of it is and a good part moves direct, but I don't know what percentages.

By Mr. Chartrand:

Q. Of the truckers that do this trucking, do they have a different rate for hauling from the farm to your elevator than from another elevator to your elevator?
[fol. 673] A. That I really don't know. We don't contact the truckers ourselves at all.
Q. You don't pay the trucking charges.
A. No.

Mr. Chartrand: Thank you.

Cross examination.

By Mr. Murphy:

Q. When you buy direct from the farmer in what you characterize as your normal trade area, the farmer bears the trucker costs to your elevator?
A. That's right. We buy it delivered to the elevator.
Q. All your bids, your river bids, are for corn in trucks at your elevator.
A. That's right.
Q. And you take care of the process of elevating it out of the truck into your elevator, is that correct?
A. That's correct.
Q. Is that the practice of all elevators in so far as—
A. I believe it is.
Q. Corn that you buy from the farmers in your normal trade area does not move through an elevator prior to reaching your elevator, does it?
A. No, not that we buy direct from the farmer it doesn't, no.

Q. Do you ship by Mechling Barge Line?

[fol. 674] A. We ship some by Mechling, yes.

Q. When you sell corn what is the basis for your sale? Is it in barges—if you were selling it at Chicago, would it be in barges at Chicago?

A. Usually f.o.b., Chicago, yes.

Q. That is in barge.

A. F.o.b. Chicago—no, usually it is in the elevator. Is that right?

Q. Did you ship more corn north on the river in 1957 than you did in 1956, sir, from Henry, that is?

A. No. I think our volume was some less, although it should have been larger on account of the larger corn crop.

Q. You don't know for sure.

A. No.

Q. Was your volume through your elevator greater in 1957 than in 1956?

A. Yes; we had a larger volume.

Q. Was that true for the first six months of the year also?

A. I don't have the figures for the first six months, but we had a larger crop to handle, and our volume was some larger.

Q. Would you tell us without divulging any secrets what your volume was during 1957?

[fol. 675] A. On corn?

Q. Yes. Unless that is a trade secret.

A. Approximately a million bushel.

Q. Are you clear on whether or not you sell it f.o.b. barge at Chicago or f.o.b. elevator?

A. Well, we have to pay the trimming charge. That is the reason I said it was f.o.b.—

Q. But that is the only charge in addition to the barge rate, is that right?

A. That's right. Well, there are weighing and inspection charges. Freight, weighing, inspection, and trimming.

Mr. Murphy: Thank you. That is all I have.

Mr. Freeman: I just have one question in response to the questions that were asked.

Redirect examination.

By Mr. Freeman:

Q. The volume through your elevator in 1957, you said, was somewhat greater than 1956. Does that mean that more went south in 1957 than in 1956?

A. Yes.

Q. You are speaking of corn.

A. That's right.

Mr. Freeman: That is all.

Exam. Dahan: You are excused.

(Witness excused.)

Mr. Freeman: Mr. Cunningham.

[fol. 676] Mr. Hayes: While the exhibits are being distributed, we might save a little time. Counsel for the New York Central asked me for Mechling's figures of corn, Joliet to Chicago, in certain periods this morning. In tons, 12/15/55 to 8/28/56, 28,785.53 short tons. From 12/15/56 to 8/28/57, 24,942.23 short tons.

Mr. Murphy: Thank you, Mr. Hayes.

Exam. Dahan: You may proceed, Mr. Freeman.

J. H. CUNNINGHAM was sworn and testified as follows:

Direct examination.

By Mr. Freeman:

Q. Will you state your full name and address.

A. J. H. Cunningham.

Q. By whom are you employed, Mr. Cunningham?

A. Cargill, Inc.

Q. What position do you hold with Cargill?

A. I am Chicago manager of Cargill. This competition is going to be bad with my bad throat and that thing going, so you will have to bear with me. I am also supervisor of our river elevators.

Q. How long have you been employed by Cargill?

A. About 22 years.

Q. What positions have you held with Cargill in the past?

[fol. 677] A. I started with Cargill out in Seattle, Washington as the manager of an elevator and merchandiser in 1936. I moved back to Ottawa, Illinois in late 1942, became manager of our first rural elevator which started operating in 1943. I moved from Ottawa to Chicago in 1945 after being in Ottawa about a year and a half. I came to Chicago as assistant to the manager and also as supervisor of our river facilities, and in 1954 I became manager of the Chicago office.

Q. What is your responsibility as manager of the Chicago office and supervisor of the Illinois River terminals?

A. Amongst other duties I am responsible for the purchase and sale of grains, including corn, in Chicago. I am also responsible for the price that we pay for grain and the distribution of the grain at our river points and the direction of the grain.

Q. Are you familiar as part of your regular duties with the buying and selling of grain in Chicago and in northern and central Illinois?

A. Yes, I am.

Q. And with the marketing of grain in the east?

A. Right.

Q. In what business is Cargill engaged?

A. Cargill are buyers and sellers of grain, storage of [fol. 678] grain, processing of grain, all markets, all grains.

Q. Does Cargill handle corn?

A. Cargill does handle corn.

Q. Does Cargill own and operate elevators on the Illinois River?

A. Yes, we do.

Q. Where are those elevators located?

A. We have four river elevators located at Spring Valley, Ottawa, Morris, and at Lockport, Illinois. With the exception of Morris, which is 80,000 bushels, the other three are 100,000 bushel capacity elevators.

Q. Would you describe those elevators as subterminal elevators or as country elevators as those terms are ordinarily used?

A. Definitely subterminal elevators. They are built of concrete, reinforced steel and concrete construction, and they are built for the fast handling of grain in large quantities.

Q. Do you have a picture of one of your Illinois River elevators?

A. Yes, I do.

Mr. Freeman: May that be marked for identification?

Exam. Dahan: It may be marked for identification as Exhibit Number 36.

(Protestant's Exhibit No. 36, Witness Cunningham, was marked for identification.)

[fol. 679] By Mr. Freeman:

Q. Will you indicate just briefly what that picture shows?

A. This happens to be a picture of our elevator at Lockport, Illinois, shows the structure of the elevator, the loading gallery, and this picture shows a loaded barge sitting in front, a series of barges, I might say.

Q. Are your Illinois River elevators served by rail?

A. No, we have no rail facilities at any of our river points.

Q. How long has Cargill operated its elevators on the Illinois River?

A. We started our operation in Ottawa in 1943.

Q. Does Cargill own and operate an elevator in Chicago?

A. Yes, we have a terminal elevator in Chicago.

Q. Would you describe that elevator briefly?

A. Our Chicago elevator has a storage capacity of 18,000,000 bushels. Its facilities are equipped to unload grain, including corn, by rail, by barge, by truck, and by vessel—boat. We also re-ship by the same methods in all cases.

Q. Would you describe your Chicago River elevator as a terminal elevator?

A. Our river elevator?

Q. Your elevator in Chicago.

A. Chicago is definitely a terminal elevator.

[fol. 680] Q. How long has Cargill operated its Chicago elevator?

A. Since 1935.

Q. Will you describe the method and the nature of Cargill's operation of its Illinois River elevators and its Chicago elevator?

A. Well, we look upon our river elevators as a part of our Chicago operation; in other words, we look on them as a unit. The river elevators are put there by Cargill to supply Chicago with grains necessary to carry on a terminal operation. There are times also when our grain procured on the river, including corn, will be diverted to other terminal elevators of Cargill which are located in the south.

Q. How do you buy and from whom do you buy corn from your Illinois River elevators?

A. We buy 100 per cent from country elevators. We do not buy it from the producer.

Q. What is the operation of your Chicago elevator and your Chicago merchandising business so far as grain coming from the Illinois River? Where does the grain go, for example?

A. The grain comes into Chicago—speaking of corn specifically now—

Q. Yes, sir.

A. The grain is brought into Chicago, unloaded, put in [fol. 681] storage. If it is corn that needs to be reconditioned, such as grind and so forth, we have facilities for doing that. The corn is loaded out and merchandised east of Chicago. It is held in storage against satisfaction of Chicago delivery market. In some cases it is sold locally to processors in this area. That is true not only of corn but all the grains we handle.

Q. Are you familiar with the issues in this proceeding?

A. Yes, I am.

Q. Have you prepared or caused to be prepared under your direction an exhibit which shows in part the effect of the reduced rates on Cargill's volume at its Illinois River elevators as a result of the reduced rate on the Kankakee Belt?

A. Yes, I have.

Mr. Freeman: May that be marked, Mr. Examiner?

Exam. Dahan: It may be marked for identification as Exhibit Number 37.

(Protestant's Exhibit No. 37, Witness Cunningham, was marked for identification.)

By Mr. Freeman:

Q. Will you explain what that exhibit shows?

A. This exhibit shows Cargill corn purchases at Morris, Ottawa, and Spring Valley from origins south of the Illinois River during the periods December 15, 1955 to [fol. 682] August 31, 1956, and also December 15, 1956 to August 31, 1957. The first column, at Morris we received 315,539 bushels; at Ottawa, 819,950 bushels; at Spring Valley, 496,603 bushels, giving us a total grain—

Exam. Dahan: It won't be necessary to read the exhibit. I guess the exhibit will read for itself.

By Mr. Freeman:

Q. This shows a substantial reduction of corn, does it not?

A. It shows a substantial reduction during these two periods, yes.

Q. Does the reduction shown on Exhibit 37 fully portray the effects of the December 15, 1956 rate reduction?

A. No, it definitely does not.

Q. Why is that, Mr. Cunningham?

A. Well, I think that one of the main reasons is that, as has been expressed before here, we had a much larger corn crop in 1956 as opposed to 1955, as a matter of fact, it was 86 million bushels larger, and for that reason we should have expected more rather than less corn in those two periods, in 1957 as opposed to 1956. Also, the 5½ cent rate, when first came into being, was confined to the Eastern Trunk Line Territories, but in June—June 28—there was a new filing which extended them to CFA, which helped to enhance the procurement of grain. I think also the fact that [fol. 683] the rate was slow to become known, which I think was also brought out here previously today, has had its effect. As they get more used to it, the thing will become more and more aggravated.

Q. Have you had an opportunity to develop data which show the comparative cost of moving corn via the Kankakee Belt and via the Illinois River to a common market, to destination territory here involved?

A. Yes, I do have some figures on that.

Q. Would you give us your figures?

A. So that you can follow me, I have taken a point, namely Missal, on the New York Central, and I have also taken one of our points, namely Ottawa, which is our central point, being between Spring Valley and Morris, as my jumping off points. First I will talk about the rail rate on the New York Central, and I will bring it to a common point, namely New York. The freight to Kankakee—I will also talk in terms of hundredweight in all cases. Rate to Kankakee, 5½ cents a hundred. Kankakee rate to New York is 53½ cents, given us a total of 59 cents a hundred.

Taking Missal, trucking cost to Ottawa, 5.36 per hundred. River transfer, 2.68 per hundred.

Q. What was that item?

A. River transfer. Some people call it elevation.

[fol. 684] Q. You mean from truck to barge?

A. Yes, that's right. In the grain trade we normally refer to that as elevation. There are traffic men here who may not understand that.

Q. Is this a necessary step in getting—

A. Oh, definitely. The barge freight to Chicago, 4.95. We have stevedoring in Chicago, 1.15.

Q. What does that consist of, Mr. Cunningham?

A. When a barge comes into Chicago for unloading, the union or the Chicago Grain Terminals Association might, sometimes we will call stevedores, here they call themselves trimmers and shovelers, but it is the same thing—they board a barge at our elevator, a crew of 12 to 14 men, and when the marine leg goes into the barge, they enter the barge and by means of automatic shovels and brooms and sweeps, they keep the grain moving to the leg until the barge is empty, and for that we pay, on corn, $6.50 per thousand bushels. Breaking that down to the hundredweight, it becomes 1.15.

Q. Is that operation comparable in any way to what has been described here as trimming a rail car?

A. I think there is no comparison at all. A rail car more or less self trims itself. You put a pipe in a rail car and direct your flow to both ends, and your car is filled up.

[fol. 685] Q. Then it is your experience in either the loading or unloading of a grain car, that a man enters the grain car?

A. It is very seldom that a man has to enter a rail car unless he is at some country elevator that has no drop at all. If they have any drop at all, a rail car of corn will load by itself pretty much.

Q. When you say "drop," you mean drop from a country elevator.

A. That's right, comes down into the shoveling spout.

Q. Will you proceed?

A. Then we have the general term here of elevation of grain at Chicago, I will call it Chicago transfer, if you will, which is 4.01 per hundred.

Q. That is transfer from what? You are talking now about from a barge to a rail car?

A. This is what we call elevation, getting grain from our elevator out into a boxcar.

Q. This is a necessary step in getting grain—

A. If you want to get it into a boxcar, you had better do it. We also have an outbound inspection on grain of 0.45. Then we also have the rail rate to equalize this from Chicago to New York of 53½.

Q. You haven't included an outbound inspection along the Kankakee Belt. What is your reason for excluding that and including it on the river operation?

[fol. 686] A. Well, you will notice that I did not include inbound elevation at Chicago, either, which is necessarily a part, but—

Q. You mean inbound inspection?

A. Inbound inspection from the barge, which is necessary, but I have not included that because it, I think, will offset an inbound inspection at Kankakee, and as far as outbound is concerned, I don't think they put the inspections on processed corn.

Q. This comparison, if I understand it, starts with grain in an elevator at Missal, which is on the New York Central. Would the same comparison hold if you took the grain not

at Missal but within the Missal elevator's trade territory out on a farm? Would your same figures hold?

A. With slight differences it would still hold. In order for—in other words, when we give a country elevator a bid for corn, whether he be on the New York Central or wherever he may be located, we do not know at the time we buy the corn from him where it is coming from. He may load it out of his elevator, he may have a farmer bring it in from some point within his territory, so as far as we are concerned, the cost to us is the same.

Q. Have you had an opportunity to review Mr. Graves' [fol. 687] Exhibit 25 which was introduced last week in this proceeding?

A. Yes, I have. I have it in front of me here. I would like to point out, first, that I don't think we finished this little deal here.

Q. Go ahead. Excuse me.

A. We have a difference here of 13.10 per hundred.

Q. You are now talking about your comparative figures—

A. Compared on the New York base.

Q. Does that reflect the disadvantage of moving grain via the river to Chicago over moving it along the Kankakee Belt, all rail?

A. That's right. It represents our additional out-of-pocket cost.

Q. Now turn to Exhibit 25, please.

A. Right.

Q. You see the data he there gives, headed "Chicago Market, $1.15," and below that, "Barge Transportation Cost," about four paragraphs down on that sheet. Does that fairly represent the figures there shown—does that fairly represent, as you understand it, the picture of marketing grain to Chicago from the river?

A. Well, it is fine as far as it goes, but it doesn't go near far enough because there are a lot of items overlooked of which I have just—

[fol. 688] Q. Will you briefly indicate what those items are?

A. Well, there is a trucking item of 5.36, there is the cost of unloading that barge, the extra trimming or stevedoring cost in Chicago; there is the Chicago elevation and

outbound Chicago inspection that does not enter into this, to put in—to put this in a boxcar in Chicago ready to move east. So we come up with about that 13 cent difference again.

Q. In other words, many of the costs that you have pointed out in your previous comparison simply aren't reflected here.

A. I mean, Mr. Graves has taken 5½ cents from both points, and he has forgotten everything else, and we just can't forget them, because it costs us money to bring grain up through this river and put it through the elevator and put it in the same position, ready to go out in the boxcar in Chicago via water as opposed to bringing through Kankakee by rail.

Q. You have indicated some items of cost in dollars and cents. In comparing the river operation with the operation along the Kankakee Belt, are there any other items which should be given consideration in determining what a fair relationship between the two is so far as competing merchandising relationship is concerned?

A. Yes, I think I can point out a few specific reasons [fol. 689] here. The eastern buyer basically will pay a premium for what is known as natural country-run corn, and we can bring natural river corn to Chicago and put it in an elevator and reship it without mixing it, just as is, but it still does not carry that natural country-run flavor as far as merchandising is concerned. So any corn being sold out of a Chicago elevator has an inherent disadvantage in that respect, and another very important item is weather conditions. We have to fight fog, ice, and other conditions on the river that hold up and deter barge transportation, whereas the railroads, of course, can move practically any time, and there are many times when we have been handicapped, if we have several days of bad weather on the river, we get plugged and are forced out of business thereby because of inability to transport our grain. Another point is that on the river we must, rather than accumulate 18 to 2200 bushels, to load a boxcar, we necessarily have to accumulate barge quantities, which run all the way from—I have heard several figures today—from 25 to 50 and 30 to 40, take your choice. There are barges in all of those ranges.

We have probably more of a handling loss because grain going, through Chicago facilities, to a boxcar, we have more of a shrink on invisible loss because of more handling. Also, investments in river houses are much greater than [fol. 690] country elevators. They are larger, they are built on a bigger plane, and machinery is bigger, the truck lifts are heavier and stronger, and therefore we have a bigger investment as opposed to a country elevator. Then there is also a small item, but I might mention it, namely, insurance on our barge grain coming to Chicago.

Q. That is, you have to bear the cost of insuring the grain?

A. Yes. It is not too burdensome, but it is nevertheless an added cost.

Q. The New York Central stated in its application for temporary approval, that a maximum of 6,000,000 bushels be diverted from barge to rail. Do you subscribe to that figure?

A. Is that a figure that they have picked out as being the maximum?

Q. Yes.

A. Well, all I can say, I can say definitely no to that. If the present 5½ cent rate stays in, I am afraid you will see more and more of these portable loading facilities spring up along the New York Central, even subterminals are a possibility, if that becomes a fixture. Corn is now being trucked from country elevators who are located on the various lines, such as the Santa Fe and the IC and [fol. 691] the Alton, the Q, Wabash, and so forth, to elevators on the New York Central and also portable loading rigs, and I don't think these railroads are going to sit back and let the New York Central take this tonnage away from them. We have heard a lot of disgruntlement here this afternoon along that line, so the results, I think, of this hearing are going to set a pattern for the other railroads to follow. They will probably petition for a rate—

Mr. Murphy: I will object to his testifying about what some railroad—

Exam. Dahan: Sustained.

The Witness: All right.

By Mr. Freeman:

Q. To summarize what you said to date—

A. Let me put it this way, I won't say the other railroads are going to petition. May I say "if," if you please?

Exam. Dahan: Just answer the questions of counsel.

By Mr. Freeman:

Q. Let me ask you this question, Mr. Cunningham: You foresee such effects of this rate that would mean much more than a diversion of 6,000,000 tons?

A. Yes. I can see this thing spreading and spreading to the point where other railroads, in order to compete, [fol. 692] will be crossing the Illinois River, and we have several of the railroads now crossing the Illinois River on the bias coming to Chicago, and if such a rate becomes the rate, we won't be cut off from the south only, but we will be cut off from the north, from the west, and also from right along the river banks themselves.

Mr. Murphy: This is the same thing I objected to before and it was sustained. I ask that that be stricken, that last statement.

Exam. Dahan: It may be so stricken. Just answer the question of counsel and stop right there.

By Mr. Freeman:

Q. One concluding question, Mr. Cunningham: I take it from what you have had to say and the facts which you have set forth that Cargill is in opposition to the application here sought.

A. Right.

Cross examination.

By Mr. Hayes:

Q. As a merchandiser of grain, Mr. Cunningham, has it been your observation that when one railroad puts in a depressed rate the other railroads in the area follow suit?

Mr. Murphy: I object to the question on the grounds that it characterizes the rate, and secondly, on the same grounds that I made before.

Exam. Dahan: I sustain the objection.

[fol. 693] Mr. Hayes: That is the question that I desire to ask, Mr. Examiner.

Mr. Freeman: No more direct.

By Mr. Chartrand:

Q. Mr. Cunningham, just one question. You have itemized a lot of separate factors here that are cost factors in moving it ffom origin to the river to Chicago and thence rail to the east, is that correct?

A. That is right. I could stop at Chicago, if you like, and also stop the other movement at Kankakee, and we would still come up with the same result.

Q. Apparently you feel that just the consideration of the published barge rate is not meeting like with like.

A. It is not telling the whole story, definitely not.

Mr. Chartrand: That is all. Thank you.

Exam. Dahan: Mr. Murphy.

By Mr. Murphy:

Q. Mr. Cunningham, you assume that there is no trucking costs in getting the corn to the rail elevator at Missal, do you?

A. Oh, I haven't said that.

Q. You have included an element of 5.36 cents on the truck costs to the river elevator.

A. I premised this on corn being in the Milla elevator. How it got there I did not go into.

Q. Well, now, if we started at a point where the corn [fol. 694] is grown or where it is stored by the producer before the bids of the country elevator or the river elevator go out, would that factor of 5.36 cents uniformly apply on the river movement and not on the rail movement?

A. I think we would have to allow some tolerances there. It would depend on the point, wherever this corn happens to be. It would depend on the market factors on any given day. I can say this, that when we put out a bid to

Milla, we will try this specific, suppose we bid Milla $1.10, for example, delivered our elevator, and they sell us 5,000 bushels. We do not know whether his intention is to truck it out of his elevator or whether he is going to have Joe Dokes bring it in from some point on his farm. We have no way of knowing, unless the fellow voluntarily supplies that information, which they usually don't.

Q. You bid at your elevator.

A. In all cases our bid is delivered our truck. When it hits our truck we take over, unload the grain, and it is finished.

Q. And the bid by the rail buyer is in all instances in cars at the country elevator, is that right, in rail cars?

A. As far as I know, they buy track, New York Central west—I believe that is the term used for that spur line.

[fol. 695] Q. Do you discount all of the cost factors that would be involved in getting the corn from the field in through the country elevator and in to the rail car?

A. No. Let us get back to my basic—I was talking about corn in Milla when I came up with these figures. If you want to talk about corn at some other point, I would say this, that this $1.10 we bid at Milla, if he feels that he can make more money by having a farmer haul it in, he will bid that farmer somewhat less than $1.10 because he is going to necessarily have to have a profit. Now, what it is, we don't always know. I suppose we can say maybe it averages 1 cent and ½ or two cents a bushel, but we don't ask that question. So therefore you get back to a market structure, if it is more profitable for him to truck from his elevator, he will. If he has the farmer at some point where he can get it, bid that farmer somewhat less, so he will have a profit, he doesn't have to touch it, he trucks it to us, he will do that. He is going to look at the dollar sign just like the rest of us.

Q. Assume that the farm was midway between Milla —is this Morris you were using?

A. Ottawa, because that happens to be our central, and I thought it was the most—

[fol. 696] Q. Suppose the farms were midway between Milla and Ottawa.

A. Yes.

Q. Wouldn't the trucking cost to the river elevator at Ottawa, operated by you, be the same as the trucking cost from the farm to Milla?

A. I would assume probably that is correct, yes.

Q. There would be the trucking cost, no matter whether it went rail or river?

A. Under present conditions that is definitely true. If we are talking about the 5½ cent rate as opposed to the river today, we would never see that.

Q. We are just talking about the charges. Where do you get $5.36 truck rates? How much a bushel is that?

A. Three cents a bushel.

Q. Three cents a bushel?

A. Correct. I think that has been pretty much established here from what little I have heard today, that that is probably a fair average for most of it.

Q. I thought it was established that the difference in the distance was controlling on the truck rate. The records speak for that.

A. I have told you there are some tolerances in this, depending on the trucking.

Q. Do you ever buy from country sellers who do not [fol. 697] have country elevator facilities?

A. As far as the New York Central is concerned, in that area, no. We do at Lockport buy grain from trucker merchants up north and west. We find we have an area up there where country elevators are too sparsely set to give us coverage, so we do have trucker merchants.

Q. Do you have any trucker merchants operating into Morris?

A. Not that I know of, no.

Q. Or Spring Valley?

A. No.

Q. As I understand it, you buy corn from other river elevator operators, is that correct?

A. Oh, yes, we do.

Q. Do you handle those purchases yourself, Mr. Cunningham?

A. Sometimes. Sometimes our Peoria office do a lot of buying of grain from other elevators.

Q. Is that under your jurisdiction?

A. Not particularly, no. Peoria is another branch office.

Q. I mean, the purchase of grain from other river elevators, other subterminals, does that fall under your—

A. In some cases it does, and in some cases it doesn't. It depends on the position.

[fol. 698] Q. For Chicago it would be under your jurisdiction, if you were buying it for Chicago.

A. That's right.

Q. You buy that corn on a to arrive basis Chicago, is that correct?

A. I might explain that that corn is bought in this market in two ways. There are some people who will buy corn delivered Chicago, where they will absorb the costs themselves. There are others who will buy it the other way, and it is just a matter of playing with the price, whichever way you want to buy it. If I am going to buy corn from you as an elevator operator, I can buy it from you two ways, trimming and selling for my account, and in that case I would probably bid you three-quarters of a cent less, or I could buy it trimming and shoveling your account and I would pay you more money for it.

Q. Just as a rail bidder buys it in a rail car, with that service performed.

A. That's right: I mean, you are going to either add it to or detract from, depending on how you buy.

Mr. Freeman: Did you hear his question? May that be asked? Did you hear his question? Will you read his question?

(Question read.)

Mr. Freeman: What does "that service" refer to?

[fol. 699] The Witness: Rail purchase has nothing to do with stevedoring because there is no stevedoring involved in a rail purchase.

By Mr. Murphy:

Q. I didn't mean to intend that.

A. I didn't, either.

Mr. Freeman: I wanted to know what the antecedent of "that" was.

By Mr. Murphy:

Q. You indicate in your Exhibit Number 37 a decline in your purchases from origins south of the Illinois River. How did your purchases in other areas trend during that period?

A. I am glad you asked that question. Origins south of the river, as we mentioned for the period 1955-56, was 1,632,000. The origins, for the like period the next year, were—we were short 460,000 bushels as determined by Exhibit 37. North of the river during these same periods, 55-56 was 1,896,000. I am leaving off the odd pounds. For 1956-57 it was 2,256,000. So we were long on the north side by about 260,000 bushels, while we were short on the south side by about 460,000.

Q. How did your total grain business from Illinois River ports to Chicago compare during 1956 versus 1957?

A. Are you still talking about the same eight-month periods in all cases?

Q. Yes, that or the full year, whichever you have most [fol. 700] conveniently.

A. Well, I can say this, without checking, that there was more corn—I think that has been established here—unloaded in the Chicago market in 1956-57 period as opposed to the 1955-56, and the only reason I can—the way I can give you a rebuttal on that is that that was in spite of us getting less corn from south of the river, so we necessarily had to pick that up as a gain from the north, because we did unload more corn, but we got less from south of the river during that period.

Q. How was your movement of other grains?

A. Very good.

Q. From those ports?

A. From all ports.

Q. Morris, Ottawa, Spring Valley? Did that increase or decrease?

A. I don't know as I have that figure. I devoted my efforts to corn principally in this case. I don't believe I would have that at the moment.

Mr. Murphy: I wonder if we could have that, counsel, before the hearing is closed.

Mr. Freeman: Excuse me, what is the request?

Mr. Murphy: The movement of grains other than corn from Morris, Ottawa, and Spring Valley to Chicago.

The Witness: What bearing would that have?

[fol. 701] Mr. Freeman: I don't know. Would this cause you any substantial difficulty? Are these records available?

The Witness: No, but I don't like to have the world know what is long and short, either.

Mr. Freeman: Off the record, please.

Exam. Dahan: Very well.

(Discussion off the record.)

Exam. Dahan: Let us have a five-minute recess.

(Short recess.)

Exam. Dahan: Come to order, please.

Mr. Freeman: If the examiner please, there is a pending request by the New York Central for data concerning grains other than corn of this witness, and I am advised by Mr. Cunningham that he cannot reveal that information without revealing his position in the market and thus we must object to the request on the ground that it is irrelevant, which it is, to the proceedings.

Mr. Murphy: Can he give it in a range?

Mr. Hayes: I join in the objection on the ground of irrelevant.

Mr. Freeman: He tells me it is not only irrelevant but for good and sound business reasons he cannot do so without revealing his position.

Mr. Murphy: I mean the range, the percentage.

Mr. Freeman: We must insist it is irrelevant, and we [fol. 702] cannot furnish it.

Mr. Murphy: I have the question pending, I believe. I think it is perfectly relevant.

Mr. Freeman: There is an objection to the question.

Mr. Murphy: In that he has talked about his elevator facilities here and pressed an implication that they weren't being used.

Mr. Legg: If the examiner please, I think the witness has already stated he doesn't know the answer to the question. The only thing pending is the request for information.

Exam. Dahan: He said he didn't want to supply it, so that is the answer.

Mr. Freeman: You may ask him one question, whether he has it here.

The Witness: I do not have the information before me.

By Mr. Murphy:

Q. Going back to your computation of expenses, do you recognize that the country elevator's charges for elevating into rail cars should be added to the mere transportation charges that you have enumerated?

A. If I understand your question correctly, you are asking if there should be an elevation charge in addition to the rail charges that I have shown from the New York Central?

[fol. 703] Q. Yes. You mentioned 5½ cents plus 53 cents to New York.

A. Right. The only way I can answer is that I started on the basis of grain in the Milla elevator. It would cost them just as much to put it into a truck to bring it to us at the river as it would to put it in a boxcar, so I think that offsets it.

Q. We are talking about the corn at the producer's point where there is a truck charge to get it to the country elevator, is there not also an elevation charge to get it into the rail car?

A. He would have a cost to get it to the boxcar in that case.

Q. Has the effectiveness of the 5½ cent rate caused you to increase your bids to get corn to your elevators at—

A. Yes, it has—the tendency has been to increase the bids to try to keep a bigger flow of corn coming to Chicago. But unfortunately we can't get out fast enough because—

Exam. Dahan: Don't volunteer. Just answer the question.

By Mr. Murphy:

Q. Have those higher bids been reflected down to the farmer level, sir?

A. They naturally would, yes.

[fol. 704] Mr. Murphy: That is all I have, your Honor.

Exam. Dahan: Exhibits 36 and 37 will be received in evidence.

(Protestant's Exhibits Nos. 36 and 37, Witness Cunningham, were received in evidence.)

Mr. Freeman: I have one or two questions.

Redirect examination.

By Mr. Freeman:

Q. You were asked about corn halfway between Missal, your point of illustration on the New York Central, and Ottawa. Would that be outside the normal trade territory of the Missal elevator?

A. Halfway, I would presume, would be about ten miles.

Q. Would that be another country elevator's territory?

A. It very well could. I don't know what circle Missal claims to have, but the norm is between four and six miles, usually, for a country elevator. That seems to be their serving area unless they are sparsely located.

Q. If it were outside the normal trade territory of the Missal elevator, you would be buying from another country elevator, would you not?

A. It is possible. I wouldn't know. They might be competing for that same lot of corn.

Q. In the event you were buying from another country elevator between Missal and the river, would there be a [fol. 705] margin for that country elevator in the price that he gets for the corn, between the price he gets from you and the price he pays the farmer?

LEO starts here

A. We must assume that when a country elevator sells its corn from a farm, he is not going to do it for nothing, therefore, he is going to bid that farmer somewhat less than our bid.

Q. You were asked and you gave some figures for your purchases from north of the river which were greater in the period 1956-57 than they were in 1955-56.

A. Yes.

Q. You previously referred to the fact that there was a larger corn crop available in 1956 than 1957. Is that the reason that you give for this increase north of the river?

A. Well, we must assume that that was the difference because we still enjoyed the same pattern of accumulating corn north of the river in both seasons.

Q. Would you expect if this rate would not have been in effect that you would have had larger purchases rather than smaller from south of the river?

A. Right.

Mr. Freeman: That is all.

Exam. Dahan: Did you have a question?

Mr. Hayes: I had a question I thought I might ask. [fol. 706] May I inquire with Mr. Freeman?

Exam. Dahan: Mr. Chartrand.

Mr. Chartrand: I will ask one question of Mr. Cunningham in response to something Mr. Murphy asked.

Recross examination.

By Mr. Chartrand:

Q. You did not include in your figures via rail the transfer at the rail elevator into the boxcar. What commission or handling charge does the rail elevator usually charge for that?

A. Are you speaking of corn in a country elevator on the New York Central?

Q. Yes, going into a boxcar. What commission or handling charge does he usually charge for that?

A. I am afraid he will have to supply that question. I can't answer for the country elevator.

Q. Well, some charge is made for handling it.

A. We certainly know that they don't operate just for fun.

Q. I believe you indicated that some charge is made by the interior elevators when they deal with the river in dealing with the farmer.

A. Let me state it again. We bid $1.10 for corn. We don't know whether he is going to truck it to us from his elevator or buy it from some farmer at a point. We don't

know that. We assume if he trucks from the elevator that [fol. 707] he has some profit in it, otherwise he will put it in a boxcar and send it on.

Q. In each instance those men withhold something—

A. If he can make more money by buying at an intermediate point and bringing it to us than he can shipping his corn by rail, he will do that.

Q. In each case they hold something for the service rendered?

A. I would think so. I know I would.

By Mr. Legg:

Q. When you say "in each case," are you referring on the one hand to the New York Central elevator operator delivering the rail car and on the other, the country elevator delivering to the river elevator?

A. I don't think it matters. I don't think it matters at all. That corn is going to cost us $1.10 delivered to the river regardless of by what means it comes there.

Q. You expect normally, though, that both elevator operators, whether they are on the New York Central—

A. You say both elevator operators. What two?

Q. One on the New York Central and one someplace else, selling to the river elevator—

A. Now I am with you.

Q. —will keep a commission to cover the cost of their own service.

A. Right. That is their mark-up.

[fol. 708] By Mr. Murphy:

Q. You indicated that a point midway between Missal and Ottawa would be ten miles from Missal.

A. I just picked that. I am not too sure. I assume it is about twenty miles. Maybe I am wrong.

Q. Did you mean to indicate that the competitive effect of the New York Central's rate was felt only five miles from the New York Central?

A. I didn't say that.

Q. Do you know how far it has been felt?

A. I believe that that has been answered by some of these country elevator boys.

Q. You don't know yourself.

A. No, I haven't been down there policing that one. I haven't been down there measuring the miles.

Q. Now, on the question asked by Mr. Legg, I had the impression earlier that you were comparing movements to the river or movement by rail when you indicated that you assume that the country elevator operator would have some profit and some element in there to cover his handling cost. Do you think that would be true also?

A. Would you restate that again because I didn't quite follow you?

Q. You assume that on a movement on grain bid for rail movement that the country elevator operator would have an [fol. 709] element in there for his elevation and his handling charges and his profit, too.

A. Oh, yes. Surely.

Mr. Murphy: Thank you.

Exam. Dahan: You are excused.

(Witness excused.)

Exam. Dahan: Next witness.

Mr. Freeman: Mr. Adams.

THOMAS ADAM was sworn and testified as follows:

Direct examination.

By Mr. Freeman:

Q. Will you state your full name and address?

A. Thomas Adam, Chicago, Illinois.

Q. By whom are you employed?

A. Glidden Company, Chemurgy Division.

Q. What is your position with the Glidden Company, Chemurgy Division?

A. Division traffic manager.

Q. How long have you held that position?

A. Six years.

Q. What are your responsibilities?

A. Supervision of transportation matters to and from the processing plants and grain elevators of the Chemurgy Division.

[fol. 710] Q. In what business is Glidden Company, Chemurgy Division thereof, engaged?

A. Soybean processing and terminal grain elevator operations at several midwestern locations.

Q. Do you buy and sell corn?

A. Yes.

Q. Where are the Chemurgy Division's facilities at which corn is normally handled?

A. We occasionally handle corn at the soybean processing plants, but for all practical purposes our main corn handling facilities are at our Chicago terminal on the south side, located at Calumet River, and two river elevators, one located at Lockport, and one at Seneca, Illinois.

Q. What is the capacity of each of the elevators you just mentioned?

A. I will ignore the soybean processing plants since they are not in question here. Our terminal elevator at South Chicago is located on the Calumet River and has a storage capacity of 6½ million bushels. It is a federally licensed public warehouse with facilities to ship and receive grain via rail, truck, and water. This elevator was built in 1955 and 1956. In connection with this terminal elevator we have a subterminal elevator at Lockport, Illinois and another at [fol. 711] Seneca. Each of these are of 200,000 bushels capacity with facility to receive only by truck and ship via barge. Both of these river subterminals were also built at the same time as the Chicago terminal, 1955-1956.

Q. Will you describe briefly the manner in which the grain elevators on the Illinois River and at Chicago are used in your corn buying and selling and handling operation?

A. When Glidden decided to enter the terminal grain elevator operations at Chicago in 1955, the Illinois River subterminals at Lockport and Seneca were included as essential parts of this operation. The size of the Chicago terminal took into consideration the anticipated purchases through the subterminals. At the Chicago terminal we purchase free corn to arrive via rail, truck and barge. The

purchases are from country elevators, grain commission merchants, and others, but never from farmer growers direct. As a public elevator we also handle corn and other grains for elevation or elevation and storage via rail, barge, or water. At the river subterminals we purchase truck grain from country elevators adjacent to the river for elevation and loading to barges for shipment to our Chicago terminal elevator or for sale and shipment to other destinations southbound and down river. Corn is then merchandised from the Chicago terminal and resold either [fol. 712] immediately or at a later date to eastern and other destinations.

Q. Are your Chicago houses public elevators?

A. Yes.

Q. Licensed under the U.S. Warehousing Act?

A. Yes.

Q. You say that you buy only from country elevators rather than from farmers. Is that necessary in your operation?

A. A subterminal elevator on a river and a terminal elevator at a terminal point requires volume to operate. Buying from farmers would limit the volume that you could acquire as it would antagonize your regular source of supply, which has for years been the country elevator.

Q. So that you feel in order to get the volume necessary to operate a subterminal house you must buy from country elevators.

A. Established grain country elevators.

Q. Has the reduction on the Kankakee Belt to 5½ cents been felt in your operations on the Illinois River?

A. Our short period of operation at the river elevators does not give us sufficient comparative data to present here, and although we have only been in operation a comparatively short period of time, the receipts of corn from the [fol. 713] area of the Kankakee Belt Line have definitely fallen sharply in what little experience we have had during the periods when the 5½ cent rate to Kankakee was in effect.

Q. You mean because your elevator was constructed just shortly somewhat before this rate went into effect, you

don't have a before and after story as some of the other witnesses have had?

A. That is true.

Q. Do you have data which shows the cost of bringing corn via the Illinois River into Chicago for destination east as compared with the cost along the Kankakee Belt?

A. Yes. We ran a check to see what our costs would be comparative to rail. In going into the cost via truck, barge, as in Mr. Cunningham's testimony, the first item of transportation cost involved would be the trucking charge from the country elevator to the river elevator, of a nominal 3 cents, per bushel, that is.

Q. What is your next item of expense?

A. A second item would be the river elevation of 1½ cents per bushel, for unloading, weighing, elevating, and loading to the barge. Then as follows, the actual barge rate from our Seneca elevator is 94 cents per ton or 2.63 cents per bushel. Upon arrival at the Chicago terminal there is a barge to rail elevation or transfer of 2¼ cents per bushel, [fol. 714] plus a barge stevedoring or trimming cost of a figure ranging anywhere from 6½ to $9.00 per thousand bushels. In our case it generally averages $7.50 per thousand or ¾ of a cent per bushel. This comes to a total of 10.13 cents per bushel or approximately 18 cents per hundredweight as compared to the 5½ cent Kankakee rate.

Q. Does that reflect the disadvantage of your operation by river as compared with the operation via the Kankakee Belt of corn to be marketed in the east in competition with corn from the Kankakee Belt?

A. There are other minor disadvantages that can be measured in the operations of a subterminal terminal. We take ownership of the grain at the river elevator and therefore assume any shrink losses in transit from the truck to the river terminal or to the terminal elevator at Chicago. The barge rates to Chicago do not include common carrier liability, and we therefore must arrange for and pay premiums on cargo and marine insurance. At times weather condition, such as fog, ice, low water, make barge movements and availability of equipment uncertain.

Q. In the light of what you have just said does the Glidden Company, Chemurgy Division, support or oppose the

application of the New York Central for Fourth Section [fol. 715] relief in this proceeding?

A. We oppose the application.

Mr. Freeman: That is all the questions I have.

Cross examination.

By Mr. Murphy:

Q. Are you aware of the fact that the barge shipments from Seneca, Illinois for the first eight months of 1957 were greater than for the first eight months of 1956?

A. From our elevator?

Q. From Seneca.

A. We are not the only elevator at Seneca. We weren't in operation in 1956.

Q. When did that elevator go into operation?

A. Around August or September of 1956. We started to move our first grain then.

Q. Were your movements from Lockport greater or lesser during the 1957 period than 1956?

A. There is only 30 days' difference between the operation of both elevators. Lockport and Seneca were built simultaneously. I think August was the first at Lockport and September the first at Seneca. If I had those figures, I would have presented them.

Q. Have you made any rail movements to Chicago to your terminal elevator from this area in the recent months? [fol. 716] A. Have we made any movements?

Q. Yes.

A. Not that I know of, no. We buy grain at Chicago.

Q. You don't buy grain at the country and have it shipped to Chicago by rail.

A. No.

Q. Do you process corn in Chicago?

A. No. We are soybean processors only.

Q. You calculated some charges here which you said would be 18 cents a hundredweight.

A. Yes.

Q. On the truck-barge. Did you compare those with the 5½ cent rate?

A. Yes.

Q. You have an elevation charge here for getting the corn from a truck into the barge.

A. Yes.

Q. Isn't there an element for elevation from a truck into a rail car also?

A. As was brought out previously, there are different ways of looking at it. When you are buying from a country elevator you are assuming—we are assuming in this cost analysis anyway—that it is in the country elevator and there has had its country elevation already.

Q. Do you assume that that is a fact in all cases?

[fol. 717] A. We have no other basis to go on, other than we know that the country elevator who sells to us has the option of selling from his elevator grain that he already has purchased or shipping directly from the farmer. Now, we have no way of knowing whether he changes his margin in either case.

Q. What are the country elevators from which you buy corn at Ottawa?

A. I do not have facts on that.

Q. Do you know what the country—do you know what the names of the country elevators from which you buy corn at Lockport are?

A. No. Whatever I would say would be hearsay. I am not in charge of the country elevator operation, but I think Lockport is mainly north of the river rather than south.

Q. Do you recognize there has to be some trucking cost to get corn from the farm to the rail elevator as well as to the river?

A. Oh, yes.

Q. That would be a charge that could be properly added to the rail rate.

A. We were comparing in our cost study here a bid in cars at the elevator as compared to a bid in truck at the river elevator.

[fol. 718] Q. You weren't comparing bids at all, were you?

A. Well, positions of grain, I should say, cost.

Q. Let me ask you about the barge rate. Does that apply on corn in barges?

A. I beg your pardon?

Q. Does the barge rate which you referred to apply on the corn in barge?

A. Naturally, yes.

Q. Then to that you say must be added the elevation into the barge?

A. Yes.

Q. Are you familiar with the rail rate?

A. From—5½ cents, yes.

Q. Does that apply on corn in rail cars?

A. Yes.

Q. So anything that goes before that must be added to both the barge rate and the rail rate.

A. Yes.

Q. Do you buy barge loads of corn from other river elevators, other than those that you operate?

A. Yes.

Q. What is the basis for buying that corn, on a to arrive basis at Chicago?

A. CIF Chicago, cost, insurance, and freight delivered in barges.

[fol. 719] Q. If you bought corn for a rail movement to Chicago would you have an elevation into your elevator at Chicago, from the rail car?

A. That would be our option. We can sell it off track also.

Q. But if you were putting it into your elevator, market conditions vary, you would have to elevate it from the rail car into your elevator, is that correct?

A. If we decided to put it in storage, yes, but that is not necessary.

Q. Are you familiar with the purchase of grain in so far as the actual practice of buying the grain, or do you have someone else in your company that handles that?

A. I was a grain buyer for three years, prior to being traffic manager. I could answer some questions.

Q. Is it true that corn, in this part of Illinois with which we are concerned, is generally bought for rail delivery on the IP basis?

A. Yes.

Q. That being the lowest freight charge that you could compute in Chicago?

A. Chicago IP.

Mr. Murphy: Thank you. I believe that is all.
Mr. Freeman: I just have one question.

[fol. 720] Redirect examination.

By Mr. Freeman:

Q. You testified that you bought solely from country elevators. Does it make any difference whether the country elevator is located on the New York Central or some place, does the country elevator get a commission or spread between the price that you pay the country elevator and the price that he pays the farmer?

A. Certainly. I assume he does, like Mr. Cunningham.

Q. That is a commission or margin for his handling?

A. Right.

Q. That is in addition to the truck cost to the river?

A. I can't answer that. I don't know. I would say so.

Mr. Freeman: That is all I have.
Exam. Dahan: You are excused.

(Witness excused.)

Exam. Dahan: Mr. Erickson, did you have a witness you wanted to put on this morning that was unavailable?

Mr. Erickson: No. That was Mr. Farlow who has filed his appearance.

Mr. Freeman: I have run out of witnesses for today.

Exam. Dahan: We will recess until 9:30 tomorrow morning at the same place.

(Whereupon, at 4:45 p.m., a recess was taken until 9:30 a.m., Tuesday, February 4, 1958.)

[fol. 723] PROCEEDINGS—February 4, 1958

Exam. Dahan: Come to order, please.
Mr. Freeman: I call Mr. McClintock.

J. O. MCCLINTOCK was sworn and testified as follows:

Direct examination.

By Mr. Freeman:

Q. Will you give your full name and address?
A. My name is J. O. McClintock. I reside at 426 Forest Avenue, Oak Park, Illinois.
Q. By whom are you employed, Mr. McClintock?
A. Illinois Grain Corporation.
Q. What is your position with the Illinois Grain Corporation?
A. Vice president in charge of merchandising grain.
Q. How long have you held that position?
A. Five years.
Q. With whom were you employed before you were employed by Illinois Grain Corporation?
A. I served as an executive officer of the Chicago Board of Trade.
Q. What were the dates in which you were executive vice president?
A. 1948-52 inclusive, five-year period.
Q. Were you president of the Chicago Board of Trade?
[fol. 724] A. In 1947.
Q. Prior to that time have you been engaged in grain merchandising in the Chicago area?
A. I have.
Q. And for how long approximately?
A. Prior to 1948?
Q. Yes.
A. Fifteen years.
Q. What business is the Illinois Grain Corporation engaged in?
A. They are engaged in the buying and selling of grain.
Q. What kind of a corporation is the Illinois Grain Corporation?

A. It is a cooperative.

Q. What is its membership composed of?

A. Individuals, farmers, farmer organizations, country elevators.

Q. Could you describe Illinois Grain Corporation's facilities for handling corn, with particular reference to its facilities on the Illinois River and at Chicago?

A. They operate a 6½ million bushel elevator in Chicago on deep water. We own and operate four elevators on the Illinois Waterway, located at Morris, Hennepin, Lacon, and Havana.

Q. Are your elevators on the Illinois River served by rail facilities?

[fol. 725] A. I believe two of them are; two.

Q. And two of them are not.

A. That is correct.

Q. Are you familiar in general with the issues in this proceeding?

A. Yes.

Q. And you are familiar, of course, with the rate reduction on the Kankakee Belt by the Illinois Central on December 15, 1956—New York Central.

A. Correct.

Q. Have you prepared an exhibit showing the effect of the reduction on one of your river facilities?

Mr. Murphy: I object to the question on the grounds that the exhibit does not show what counsel asked for.

Mr. Freeman: All right, I will rephrase the question, if you please. I am trying to shorten this matter this morning.

By Mr. Freeman:

Q. Have you prepared an exhibit entitled "Corn Receipts at Illinois Grain Corporation Elevator at Morris, Illinois," et cetera?

A. Yes, I have.

Mr. Freeman: May that exhibit be marked, please?

Exam. Dahan: It may be marked for identification Exhibit Number 38.

[fol. 726] (Protestant's Exhibit No. 38, Witness McClintock, was marked for identification.)

By Mr. Freeman:

Q. Very briefly what does that exhibit show, Exhibit 38?

A. Well, it shows the corn received at our Morris elevator from south of the river during nine months of January, February, March, April, May, June, July, and August of 1956, and a corresponding period in 1957. The figures during the 1956 period show that during that time we handled 854,326 bushels from the territory designated as south of the river, and for the corresponding period in 1957 we received 365,005 bushels.

Q. Have you also prepared an exhibit, Mr. McClintock, the first page of which is entitled "Disadvantage of Corn Destined to New York City Via Truck-Barge-Rail"?

A. Yes, I have.

Mr. Freeman: May that be marked for identification, please?

Exam. Dahan: It may be marked for identification as Exhibit Number 39.

(Protestant's Exhibit No. 39, Witness McClintock, was marked for identification.)

By Mr. Freeman:

Q. Will you explain that exhibit, please?

A. Well, there is involved here a situation where various [fol. 727] forms of transportation are competing for a particular class of tonnage from a particular locality. The locality in general is the territory served by the Kankakee Belt of the New York Central Railroad, and the different forms of transportation represent in one case a movement by rail from New York Central locations through Kankakee, hence to eastern territory, and the other involves the acquisition of grain from the same territory that moves, by necessity, to engage in this form of transportation, truck to the river, transferred from truck to barges to a river facility, thence moves to Chicago by barge, where it has to be transferred again from barge to rail in order to engage the existing proportional rate that is named out of Chicago.

Now, I think if we just—does everybody have one of these maps?

Q. Yes, they have been distributed.

A. This is just a rough sketch here, but fairly well represents the mode of travel and the distances involved and the charges accumulated in the movement from Dwight, Illinois. I have taken Dwight because it is a good sized shipping station, serves a big territory, perhaps one of the better shipping stations on the New York Central. It is located approximately 20 miles from Morris, Illinois, where we have a river location, river elevator location, and [fol. 728] it was Morris, Illinois that these figures I read a moment ago represent. In order for corn out of the Dwight territory to get to Chicago by barge river there are certain expenses incurred other than the actual transportation cost. They must be taken into consideration in considering a competitive situation that developed with a competing form of transportation. Up to the point where corn is received in an elevator at Dwight the rates in question in this proceedings have very little to do with getting the corn into the elevator at Dwight. But once there you have a pattern where just simple arithmetic tells the story. There is nothing mysterious or peculiar about it. It is just simple addition and subtraction. To get corn from Dwight to the Illinois River there is a charge of 5.4 cents per hundred. That represents the trucking charge from Dwight to Morris. Then we have to maintain the facility, rather expensive facility, at river location to transfer the barge corn into truck corn —into river, water movement—and the facility must, of necessity, be of some size in order to accumulate at least a little barge which averages around 40,000 bushels. We have used a figure here of 2.7 cents per hundred as representing the cost of transferring corn or grain from trucks to barges, 2.7 per hundred.

[fol. 729] Then there is the actual transportation cost from Morris to Chicago of 4.4 cents per hundred. That represents the charge made by the barge line. Then in order to engage the proportional rate on the corn that comes from Dwight over this circuitous route to Chicago via Morris, there has to be another transfer made and a charge paid to stevedores, grain trimmers, as we call them, and the amount of that is 5.2 per hundred. That is made up or broken down, the trimming charge is approximately 115

or .65 hundredths of a cent per bushel. The other is made up of the published tariff maintained at our elevator and is the rate which the public pays for services that we render, and it amounts to 2¼ cents a bushel, so that 2¼ cents a bushel and the .65 cents per bushel make up this 5.2 charge at the Chicago transfer point.

Now we have this grain up to Chicago, and at that location we can engage the proportional re-shipping rate out of Chicago to Eastern Trunkline Territory which is where the 5½ cent rate may engage at either Chicago or Kankakee.

Now, if you had these—just a moment, please. The 5½ cent per hundred rate that has been referred to here is not actually a 5½ cent rate to Kankakee or Chicago. It is conditioned on the grain moving east, and our experience [fol. 730] in the early part of the application of this rate was that it had to be milled in transit, and it had to be moved to trunkline territory, eastern seaboard territory. So really what we should be talking about, what is the cost to get grain to New York City, which is a representative point in the trunkline territory, by these various competing lines.

Now, it is obvious to anyone that the line and the mode of transportation which involves the least cost will capture the business, and they will capture more than the ordinary business to an extent that the cheap rate is lower than the higher rate.

Now, in this case, over the route that I have just referred to, truck-river-rail to New York City, is 71.2 cents per hundredweight. Now, that figure is a component of the proportional rate which we engage here of 53.5, and I am referring to the 53.5 because I am in the grain business. The product grain is in all cases a half a cent higher. But this 71.2 is the sum of the 53.5 proportional rate, and the figures that I referred to awhile ago consist of the truck, transfer at the river, transportation cost from the river point to Chicago, and the elevation and extra handling at Chicago, a part of which is actual out of pocket money. The rest is indirectly out of pocket because it bears a large [fol. 731] expense to maintain the facilities that are necessary to effect these transfers. So starting at Dwight and

going the route that I have been discussing costs us 71.2 cents a hundred to get to New York City, where we meet the competition of a rate from the same point, Dwight, Illinois, to New York City, of 53½ cents.

Now, there is a slight difference there between 53½ and 71.2, amounting to—

Q. That is 59, is it not? Your total of 53½?

A. Excuse me. The rate is 53½ plus 5½, or 59 cents, so the difference would be between 59 cents, the rate at which corn can move from Dwight to New York City all rail, and 71.2 cents, the cost of moving it over the route that I have previously referred to, a difference of 12/2 cents per hundred.

Exam. Dahan: Excuse me. I would like to have you ask him questions. He has been going on and on, saying almost the same thing.

Mr. Freeman: This is a matter with which he is intimately familiar, and I thought it would be helpful if he would explain this in some detail.

Exam. Dahan: I believe he has, but we have so many repetitions, and I don't know how far he is going to go here.

By Mr. Freeman:

Q. I will ask you now, if you will, to explain the second [fol. 732] sheet, pointing out only the differences, Mr. McClintock, in this illustration of the application of the rate when it is destined to a processor in Chicago as distinguished from a processor located east.

A. Well, I would like to premise that remark just with the remark that Chicago—in Chicago is located a large corn processing industry and represents one of the principal outlets for corn produced in Illinois. Without repetition and quoting the same figures, in addition to having to pay the figures I have previously mentioned to get the grain up to Chicago, in order to reach an industry in Chicago, we are at a disadvantage of having to pay a crosstown switch that amounts to—well, a minimum of about 2¼ cents a bushel, and for comparison, it simply means that grain moving into Chicago by rail is not required to pay the crosstown switch. They have free switching to the local indus-

tries, free so far as the shipper is concerned. So we are at a further disadvantage in reaching Chicago industries to the extent of this 2 and approximately ¼ per cent per bushel.

Q. Mr. McClintock, does the price paid by a New York Central elevator or at a New York Central elevator and the price paid by a river operator at the river—we have had some figures comparing those two—does that reflect the [fol. 733] disadvantage of river corn?

A. Are you referring to some figures? What particular figures are you referring to?

Q. Figures have been put into the record the last two or three days. Have you been present at the hearing the last two or three days?

A. Most of the time.

Q. Figures which show that the river is bidding the same or maybe only a quarter or half cent less than the New York Central.

Mr. Murphy: I object to the question unless you identify the witness, connect it up a little more, Mr. Freeman.

Mr. Freeman: Well, there has been a lot of testimony to this effect, and we are trying to expedite this matter. If you want me to go back through my notes and find the witnesses, I can do so.

Mr. Murphy: Why don't you just ask him of his knowledge of it and not for—

By Mr. Freeman:

Q. I will ask if equal price paid by a river operator or a comparable price paid or a half cent more by an operator on the New York Central reflects the disadvantage of the truck-river route over the all-rail New York Central route.

A. Well, I think we might take Dwight again as an ex- [fol. 734] ample. If the buyer located on the New York Central was bidding, for example, $1.10 for corn, and we at the river were bidding $1.10 for corn, we would be out of line to the extent of the cost of getting that corn from Dwight to Morris, which is 3 cents per bushel, so paying the same price at two locations doesn't tell the story because you have to take into consideration the cost of getting the grain from the point of origin to the point of transfer on

the river and again take into consideration the cost of getting that on the water transportation. Your disadvantage, just in the figures I have indicated in getting the grain from Dwight to Chicago, which is about 12.2 cents per hundred. In other words, the elevator on the New York Central could bid 7 cents a bushel, approximately 7 cents a bushel, more for corn than we could at the river and be at no disadvantage. In other words, there is about 7 cents a bushel leeway in there, and if they are only paying a cent more, then they are not paying nearly as much as they could under the favoritism of the rate.

Now, that is one thing that concerns me very much. It is not what is being done today that the elevators located on the New York Central are paying a half cent or a cent over. The fact is, if they so want to, in competition, they could pay 7 cents a bushel more for corn than we could [fol. 735] at Morris and be at no disadvantage so far as meeting our competition in New York or points taking the same rate. That is what we are concerned about. It is not so much being done today; it is what can they do.

Q. Under the way in which the people have bid off the Kankakee Belt, you nevertheless have lost business today, have you not?

A. Well, certainly we have.

Q. As reflected by the figures in your exhibit.

A. The grain business is highly competitive. A half a cent will turn grain one direction or the other, even less than half a cent.

Mr. Freeman: I have no further questions.

Cross examination.

By Mr. Chartrand:

Q. When you say a half a cent one way or the other, that would be the half a cent to the country elevator or the producer.

A. The half cent to the country elevator, because we don't deal with the producer. If one grain firm bids a half cent more to the dealer at any station—I don't care, I am not referring only to New York Central points, but the

grain business is so highly competitive that a half a cent bid higher than any other bid that he may receive will get the business.

Q. Your elevator at Morris, is that in a highly competi- [fol. 736] tive position with the other river elevators in that territory?

A. Well, there are three other very strong, active firms located there, and competition takes on the nature that it does in every other location.

Q. If one of those elevators would raise their price on a particular morning a half a cent a bushel, how long would it take your people there to find that out?

A. How long would it take our people? Maybe five minutes.

Q. And if you wanted to participate in the business that day, what would you have to do?

A. We have to meet the bid.

Q. Now, do I gather from your testimony here that the country price in this territory is predicated upon this eastern demand?

A. It is at the moment. I would like to make a comment on that, if—

Mr. Murphy: I object. He has answered the question.

Mr. Freeman: He hasn't completed his answer.

Mr. Murphy: I think he has.

The Witness: It would be in your favor.

Exam. Dahan: We don't need any comments.

By Mr. Chartrand:

Q. The freight rate from this producing territory by either mode of transportation to that eastern demand would [fol. 737] have a direct bearing upon the country price.

A. Certainly.

Mr. Chartrand: That is all, thank you.

Exam. Dahan: Mr. Murphy?

Mr. Murphy: I have a few.

By Mr. Murphy:

Q. Mr. McClintock, directing your attention to Exhibit Number 38, can you tell us how far south of the Illinois River were the areas from which you drew this 854,000 bushels of grain in 1956? That is the statistics, sir.

Mr. Freeman: This is corn.

Mr. Murphy: Yes.

The Witness: Of course we drew from various distances, some within eight or nine miles of the river, and some further. The distances—I don't know, I suppose 25 miles or more, within a radius of 25 miles, the greater per cent of it.

By Mr. Murphy:

Q. Did you go as far as 40 miles south of the river?

A. I suppose there are instances when we went as far as 40 miles.

Q. Were the total bushels of corn handled through your Morris elevator in 1957 as high as the total number of bushels of corn handled through that elevator in 1956?

A. I really don't know offhand. I could supply you with [fol. 738] the information if you want it.

Q. Can you give me any relative understanding as to your elevators at Hennepin and Lacon, 1956 over 1956, or under?

A. No, I can't, nothing definite.

Q. Directing your attention to Exhibit Number 39, sir, on sheet 1 thereof you show a trucking cost from Dwight to Morris of 5.4 cents per hundred pounds. I ask you, isn't it a fact that a substantial amount of the corn that you buy moves directly from the farm to your elevator without going through a country elevator?

A. I would say a sizable amount does.

Q. Well, on corn moved directly from the farm to the river elevator you wouldn't have a 5.4 cent trucking charge in excess of the trucking charge to the country elevator for rail movement, would you?

A. I think you would. I don't think the fact that it was moving off the farm is too important for the reason that time to a trucker is money, and he can go to an elevator

and have a load of corn siphoned into his truck in probably about five minutes. If he goes out to the farm where they are shelling, he is not going to make such good time in getting a load and getting back to the elevator, so I would say that there is not too much difference in what it would cost to move grain off the farm as compared to moving it [fol. 739] out of the elevator.

Q. What is the authority for your 5.4 cent truck charge?

A. Well, that has been our experience. We know incidentally about what the costs are from various points.

Q. Did you hear the witnesses testify yesterday to the effect that the trucking costs vary with the distance, that that was the controlling factor?

A. It varies with the distance when you are talking about the distance of one elevator to another. I don't think they were making reference to distance within their own area.

Q. No, it varies with the distance the corn is handled, is transported in the truck.

A. To the minimum rate, whether you go five miles or ten, it doesn't make much difference. There is a minimum cost.

Q. How far is it from Dwight to Morris?

A. It is 18 or 20 miles.

Q. Would that be a higher rate than the rate for 10 miles?

A. A little maybe, not too much. There is a minimum rate, just like you have a minimum rate.

Q. Doesn't the country elevator operator who acts as an agent for the procurement of corn for you—

A. He doesn't act as our agent. He is the principal.

[fol. 740] Q. All right, he acts as a principal, but doesn't he give the farmer river bids and rail bids?

A. I assume so.

Q. And let the farmer—

A. No, the farmer doesn't know where the corn is going in most cases. He bids for corn. The farmer is not concerned with what the elevator man does with it. The elevator man determines the bid on the competing bids, and he will accept the highest bid.

Q. There is testimony to the effect that the farmer pays the trucking cost to the river if it does go to the river.

A. But he has made a price delivered the river. He knows what it costs.

Q. The farmer makes a price delivered to the river, does he?

A. No, the country elevator man.

Q. To the farmer.

A. To the farmer, if it is going to move direct.

Q. Well, let us take that situation then and assume that we have a farm midway between Dwight and Morris. Wouldn't the trucking cost from that farm to Morris be the same as the trucking cost to Dwight?

A. I would assume about the same.

Q. And isn't there an elevation at Dwight to get the [fol. 741] corn from the truck into the rail car, just as there is an elevation at Morris to get the corn from the truck into the barge?

A. He has a much less expensive facility required at the river. It costs probably twice as much to build an elevator on the river as it would to build the same capacity of an elevator out on the prairie because of the physical equipment you have to put into the structure of the building and along the river banks, where it requires piling for the foundation to be set on, so there is a great deal more expense involved at river location than there is out on the prairie.

Q. He has a lower volume to amortize that expense, however, at the country elevator stations, doesn't he?

A. He did before the New York Central put in the 5½ cent rate.

Q. He still has according to barge figures. These figures you show here on your Exhibit Number 38 are not the total number of bushels handled during the eight months of 1957 through your Morris elevator, are they?

A. No, I believe I classified it as coming from south of the river.

Q. You indicated you didn't know how much your corn handlings to that Morris elevator were in 1957 under 1956, I believe.

[fol. 742] A. I repeat, I don't. I can find out pretty quickly.

Q. Can you give us an approximation of how much it was off or how much it was over?

A. No, I wouldn't want to risk that.

Q. You referred to an elevation of 2¼ cents a bushel at Chicago. Does that include an element of profit? You said that was a published charge.

A. It is a published tariff. We are licensed under the Federal Warehouse Act to do this business, and they approve of the tariff or consent to a tariff. I don't know whether they would approve it or not, but they consent to the tariff of certain calculations, and this is the charge for handling grain through the elevator, 2¼ cents a bushel, and Uncle Sam pays that to us for handling corn that they ship to our elevator, the published rate.

Q. Is most of the corn that is handled through that elevator corn which you own?

A. I would say year after year, yes. At the moment we have more public corn than we have our own.

Q. Does this 2¼ cents include an element of profit, sir?

A. Well, you can tell at the end of year whether it has. You can't predict that it will develop a profit.

Q. I am not speaking of your total operation. I mean [fol. 743] this charge that you publish and which you assess the shipping public, other than yourself. Does that include an element of profit?

A. It could.

Q. Do you make money on elevating grain for other people that you don't have ownership to?

A. I wouldn't say that we made money on it. It depends on how much of it we do.

Q. You don't—

A. If we transferred five cars today for 2¼ cents a bushel and we did nothing else, we would lose money. If we transferred a hundred cars, we would probably make some money. You can't determine those things. The object is to make some money.

Q. I think that answers that question.

Do you also perform other operations at your terminal elevator in Chicago other than the elevation?

A. Storage.

Q. Any others?

A. Other services?

Q. Yes, anything else that you do to the corn that you own.

A. Well, we keep it in condition, we dry it.

Q. Dry it?

A. Dry it; in a year like this where it contains a high
[fol. 744] percentage of moisture, we have to dry the corn.

Q. When you buy corn at a moisture discount and dry it, is there an element of profit there, sir?

A. You mean just in the drying process?

Q. When you operate—

A. No, very little, if any.

Q. Assuming that you are buying corn on the moisture discount, this year, number 2 corn, 20 per cent moisture, which would you give a discount under the number 2 bid price, would you be able to dry that and make a profit on the drying?

A. Well, that would depend on what the competition would force me to pay for it and what I could sell it for. You still got to dispose of the grain. The proof of the pudding is in selling your grain and buying it, not what you have done in between those two actions. We buy corn on the river as number 2 yellow corn. There is a certain discount set up if it does not grade true, and those discounts are supposed to cover the cost of converting that corn from the grade that it is when we get it to a number 2 grade. That is about all you can get out of it, out of a competitive situation that exists.

Q. Do you do any blending at Chicago?

A. Blending?

Q. Yes, top grade corn?

[fol. 745] A. You mean do we mix corn?

Q. Yes.

A. Our corn is mixed, certainly.

Q. Is that another operation that is profitable?

A. We are hopeful it will be.

Q. Those are operations that are over and in addition to mere elevation, isn't that correct?

A. Yes, certainly.

Q. When you buy corn for your account and bring it into your elevator, you can perform those operations on the corn that you receive by barge, is that correct?

A. We are prepared to, yes.

Q. You can make a profit on that corn that you have in your elevator.

A. Well, we make some profit, gross profit, at least. We make some gross profit, otherwise we would be out of business pretty quickly, as you can understand.

Q. On the first page of your Exhibit Number 39 you indicate no elevation on the rail route. I ask you, isn't it necessary to elevate the corn that is bought in—at the 5½ cent rate?

A. Yes, but when you are talking about a processor and your rate requires that the grain be processed, there will be a corresponding charge somewhere between Chicago and New York that would offset the charge at Kankakee. [fol. 746] If you want to go into charges all along the line, your rate imposes a condition where the grain has to be processed. Naturally Kankakee has to unload the grain because the nature of his business is such that he has to get it in the elevator and his mill before he can process it. Now, then, there would be another charge along the line some place because you require it in order to make that rate effective.

Q. I don't think you understood—

A. Yes, I understood it.

Q. Just answer me simply the question, is there an elevation required at Kankakee, if corn was milled by General Foods?

Mr. Freeman: His answer was it would be to a processor at Kankakee, it must be processed. Isn't that responsive?

Mr. Murphy: Just a minute. I am talking to the witness.

Mr. Freeman: I think he has answered your question, Mr. Murphy.

The Witness: Yes, there must be an elevation there.

By Mr. Murphy:

Q. You referred to 7 cents as a factor by which the river is out of line on this basis of rates. Can you break that factor down, please?

A. It is the difference between 71.2, which represents [fol. 747] the accumulated figures, plus the proportional rate—

Mr. Freeman: That is just his position.

By Mr. Murphy:

Q. You mean you restated this 12.2 cents you calculated in terms of bushels, is that correct?

A. No, 71.2 per hundred, while the rate direct from Dwight to New York by rail is 59, making a difference of 12.2 cents per hundred, which is about, by the time you add the federal tax on it, 7 cents a bushel.

Q. You made a statement that if the New York Central buyer was bidding $1.10 for corn and the river was bidding $1.10, the river would be out of line. Is that a bid at the river by you, for example, versus a bid by a New York Central buyer for the corn in cars?

A. Yes. If the buyer on the New York Central was paying $1.10 for corn, and we were bidding at the river $1.10 for corn, we would be out of line to the extent that the cost is from Dwight to Morris, trucking charge, and that is just the disadvantage that we have up to the first point of transfer. That disadvantage continues as we move to Chicago, and we have to get to Chicago before we can engage the same proportional rate that you grant Kankakee.

Q. Isn't it a fact that the rail bids are all for corn in the boxcar on the track at the country elevator station?

[fol. 748] A. Yes, generally that is true.

Q. Isn't it a fact that the river bids are all for corn in trucks at the river elevator?

A. Correct. That is 3 cents a bushel difference.

Q. If the bid at the country elevator was the same as the bid in the rail—in the rail car was the same as the bid before elevation at the river, wouldn't the corn move to the river?

A. No.

Q. And avoid the expense of the elevation?

A. No, because you have to truck it over to the river.

Q. You have to truck it to the country elevator station, too, don't you?

A. But that elevator, as you quite well know, that corn may be produced between the New York Central and the river, or it may be produced ten miles on the other side, so the average, the average, is Dwight to Morris.

Q. That is the basis for your situation here.

A. Yes, of course.

Q. You indicated earlier that most of your corn was grown within 20 miles of Morris. That wouldn't be south of the New York Central, would it?

A. The New York Central is about 20 miles.

Q. Where is this corn that you draw that would be south [fol. 749] of the New York Central?

A. Mr. Murphy, I believe that is your name—

Q. Yes, sir.

A. —we don't put out a bid to draw corn from any place in particular. We put out a bid delivered Morris, and the country and the country elevator, they find out pretty quick where is the best place to sell corn, so they calculate what our bid nets them back at their point of origin, and if they can do better than they can by shipping it by rail to any point, it will come to the river, and it only has to be a fraction of a cent more. I don't know where the corn came from.

Q. Wasn't that true even before the New York Central rate became effective?

A. Yes.

Q. Directing your attention to sheet 2 of your Exhibit Number 39 I ask you if what you refer to as a large corn processing located in Chicago is a dry corn miller.

A. No, it wasn't, not the largest one.

Q. Is there a dry corn miller in Chicago?

A. No, I don't think so. Feed manufacturer.

Q. Isn't the rate that would apply to Chicago for the processing operation of the large corn processor in Chicago the 20½ cent rate from Dwight to Chicago?

A. Will you repeat the question?

[fol. 750] Q. Isn't the rate that would apply on corn moving from Dwight to the large corn processing industry in Chicago the 20½ cent rate?

Mr. Hayes: I don't know what counsel means.

The Witness: All rail?

By Mr. Murphy:

Q. Yes, the local rate to Chicago, 20½ cent.

A. I think the local rate is cheaper.

Mr. Freeman: He is talking about rate going beyond, as the exhibit shows.

Mr. Murphy: Not on page 2, Mr. Freeman.

Mr. Freeman: Yes, he is. That is what those dotted lines mean.

By Mr. Murphy:

Q. Let me ask you this question, does this large corn processing industry mill corn and come within the provisions of the restriction in connection with this 5½ cent rate?

A. You mean is the local processor, wet processor we refer to, can he engage the New York Central rate of 5½ cents in Chicago?

Q. In connection with his outbound products.

A. I think so. It is my understanding he can.

Q. I think your understanding is incorrect. I don't believe it applies in connection with their products.

Mr. Chartrand: They have gluten.

[fol. 751] Mr. Freeman: May that comment be stricken from the record, that this rate doesn't apply? If they want to put on testimony to that effect, they may.

Exam. Dahan: It may be stricken.

Mr. Murphy: I would like to have the witness' tariff authority for stating that the rate does apply, sir.

Mr. Freeman: We will supply it with the next witness.

Mr. Murphy: All right, thank you.

By Mr. Murphy:

Q. Can you give me the names of the elevators located south of the New York Central from which you buy corn?

A. No, I can't.

Q. Your operations are in Chicago, operating base in Chicago, and you are not active in the transmitting of bids down at the country—

A. I determine the bid.

Q. Here in Chicago.
A. At the river.
Q. Your office is in Chicago, though, is it, sir?
A. That is correct.

Mr. Murphy: Thank you. That is all I have.
Mr. Freeman: I just have one or two questions on redirect.

[fol. 752] Redirect examination.

By Mr. Freeman:

Q. You sell to processors in the east from Chicago, Mr. McClintock?
A. Yes.
Q. And that is corn that has arrived by barge into your elevator at Chicago, and those processors compete with the processors at Kankakee and Indianapolis?
A. I don't—

Mr. Murphy: I am going to object to his discussing the business of some of his customers.

By Mr. Freeman:

Q. Do you sell to processors in the east?
A. Yes.
Q. And they mill corn products, mill corn into corn products?
A. That is my understanding.

Mr. Freeman: That is all.
Exam. Dahan: You are excused.
(Witness excused.)

Offers in Evidence

Exam. Dahan: Exhibits 38 and 39 will be received in evidence.

(Protestant's Exhibits Nos. 38 and 39, Witness McClintock, were received in evidence.)

Mr. Freeman: Mr. Dowse.

ORIN S. DOWSE was sworn and testified as follows:

[fol. 753] Direct examination.

By Mr. Freeman:

Q. Will you state your full name and address, please?

A. Orin S. Dowse, vice president of Norris Grain Company, Chicago.

Mr. Freeman: I may say, Mr. Examiner, in order to expedite, I will try to abbreviate the testimony of this witness which will in large measure be like that of the others.

By Mr. Freeman:

Q. What is your position with Norris Grain Company?

A. Vice president.

Q. What are the responsibilities of your job as vice president?

A. I supervise the river operations and merchandise corn as well as other grains out of the Chicago market.

Q. How long have you been in the grain business, Mr. Dowse?

A. I hate to think of it—38 years.

Q. Will you describe the elevators of Norris Grain on the Illinois River and at Chicago which are capable of handling corn?

A. The Chicago elevators is the Calumet and the Norris elevator. The river elevators are located at Joliet, Morris, Ottawa, and Spring Valley on the Illinois River.

[fol. 754] Q. What is the capacity of your Chicago elevator?

A. The Calumet elevator is 2,800,000 bushels, and the Norris elevator is 2,200,000.

Q. Are you familiar with the issues in this proceeding in a general way, Mr. Dowse?

A. Yes, I am.

Q. Has your operation at the Illinois River been affected by the reduction of the New York Central rate to Kankakee?

A. Yes, they have.

Q. Have you been able to develop some figures comparing 1956 with 1957 at your Illinois River elevators?

A. I have only taken Morris, Illinois because that is the one that has been largely affected by the 5½ cent rate, and our receipts in 1956, from January 1 to June 30, at the Morris elevator, of corn were 1,640,380 bushels. During the same period in 1957, 994,000—

Q. During the same period in 1956?

A. During the same period in 1957, January 1 to June 30, 994,475. That is a decrease of 645,905 bushels.

Q. Do you buy grain from country elevators exclusively?

A. Country elevators only, and I might add, the reason we do is because the country elevator is an important part of our marketing system, and secondly, we prefer not to buy from farmers and take the responsibility of any liability [fol. 755] of liens or anything like that on the grain. We leave that responsibility to the country elevator.

Q. Is it necessary, in order to maintain the volume that you need at a river house, to purchase from country elevators rather than directly from farmers?

A. We feel the country elevator can do a better job buying grain from the farmers. They know each one of them individually, the farmers spend considerable time in their elevators on Saturdays. They know each one of them personally, and we do not.

Q. The country elevator serves a useful function then in the operation of the marketing structure at the river?

A. They are very useful.

Q. And he must have a margin in order to maintain himself and be able to perform the functions of the river elevator?

A. Yes, he does.

Q. Will you say generally what has been your experience that margin is?

A. Well, that margin at the country elevator varies all the way from 2 to 4 cents a bushel.

Q. The 2 to 4 cents would include trucking from those points which are close to the Illinois River?

A. No, no, not necessarily. The country elevator's margin [fol. 756] itself is from 2 to 4 cents.

Q. That is in addition to any trucking cost.

A. Any trucking, yes, and as a matter of fact, I say the United States Government allows the country elevator 6¼ cents a bushel on government grain.

Q. Do you market corn from your Chicago elevator by selling to processors in the middle west and the east, processors of corn?

A. Yes, we do.

Q. The question has been raised with respect to boxcar situation; have you had any difficulty in obtaining empty boxcars in Chicago in 1957?

A. Well, one of our main problems is getting empty boxcars for shipments from our two elevators in Chicago, and especially the New York Central Railroad which at times has been unable to furnish us the necessary empties which we need for our shipments.

Q. Has that been true in the fall of 1957?

A. Very true, yes. As a matter of fact, we try to persuade our customers to route them any other line they can.

Q. Do you in fact, however, route some corn by the New York Central for destination east?

A. Oh, yes, we do, whenever our customers require.

Q. Do you oppose or support the application of the New [fol. 757] York Central here for Fourth Section relief on the rate from the Kankakee Belt?

A. No, I do not.

Q. You oppose the application.

A. Yes.

Mr. Freeman: That is all I have. He is ready for cross examination.

Cross examination.

By Mr. Murphy:

Q. Mr. Dowse, can you give me the number of bushels handled through your Ottawa and Spring Valley elevators, 1956 and 1957?

A. No, I don't. In the first place, the Spring Valley elevator was not completed until September 1, 1957. I do not have the Ottawa figures here. I can get them, though.

Q. Did you handle a substantial volume of corn through your Spring Valley elevator in 1957?

A. From September 1957 to the end of December I would not say we did, because we were new in that territory. The elevator has just been completed on September 1.

Q. Did you increase your corn handlings at Ottawa 1957 over 1956?

A. No. They were down. All of our river operations were down in 1957 compared to 1956.

Q. Were some of your purchases diverted from the Ottawa elevator to the Spring Valley elevator?

[fol. 758] A. No, it was not.

Q. They are right near each other, aren't they?

A. No, it was not. They do not call the same customers from those two elevators.

Q. How far south of the New York Central are the elevators to which you call your bids?

A. You mean south of the New York Central?

Q. Yes, sir.

A. I can give you who we call, a few of them here. Odell, Rusby, Emington, Cullom, Cornell, Flanagan—we cover quite a territory.

Q. Do you buy from Landis Grain Company?

A. Landis Grain Company?

Q. Yes.

A. Not to my knowledge, no. I am not familiar with all of the companies we buy from. We have a list of about 75 customers in our Morris territory. We have a man by the name of Landis working for us, though, who runs the Morris elevator.

Q. Are there any exceptions to your buying only from the country elevators?

A. I think I stated the reasons why we want to buy—

Q. I am asking you, are there any exceptions to that policy. Do you buy from truckers?

A. No, we do not.

[fol. 759] Mr. Murphy: Thank you. That is all we have.

Mr. Freeman: I have no redirect.

Exam. Dahan: You are excused.

(Witness excused.)

Exam. Dahan: We will take a short recess.

(Short recess.)

Exam. Dahan: Come to order, please.

JAMES V. SPRINGROSE was sworn and testified as follows:

Direct examination.

By Mr. Freeman:

Q. Will you give your full name and address?

A. James V. Springrose, Room 1740, Field Building, 135 South LaSalle, Chicago.

Q. By whom are you employed, Mr. Springrose?

A. By Cargill, Inc.

Q. What is your position with Cargill?

A. Traffic manager of the central region. My duties consist of the normal supervision of a traffic department and its functions, including freight audit and payments, the billing of cars, car supply, claims, rate quotations, and so forth. In addition to that, my responsibilities are coordination of the merchandising and the transportation functions of our business. Because of this latter responsibility I have had of [fol.760] necessity to familiarize myself with the merchandising patterns of the entire central region, which includes the country origin area that is being discussed in this proceeding.

Q. That is, it includes central and northern Illinois and the Chicago area and there are some other areas as well?

A. Yes. Wisconsin, parts of Iowa, yes.

Q. Very briefly, what is your past experience with Cargill?

A. I came to Chicago in my present capacity in May of 1955. Prior to that time I was traffic manager and branch office merchant for three years in our office in Louisville, Kentucky. Prior to that time I was assistant traffic manager in the St. Louis office for six years.

Mr. Freeman: Mr. Springrose has two exhibits. It may be well to mark them for identification now. I would like the picture identified first, please.

Exam. Dahan: That will be marked for identification as Exhibit Number 40.

(Protestant's Exhibit No. 40, Witness Springrose, was marked for identification.)

Mr. Freeman: The next is an exhibit of two sheets with a cover page.

Exam. Dahan: That will be marked for identification [fol. 761] as Exhibit Number 41.

(Protestant's Exhibit No. 41, Witness Springrose, was marked for identification.)

By Mr. Freeman:

Q. Are these exhibits marked for identification 40 and 41 true and correct to the best of your knowledge?

A. Yes.

Q. Will you explain what Exhibit Number 40 depicts?

A. Exhibit Number 40 is a picture of the portable loading facility at Reddick, Illinois. It was taken on January 23, 1958. In the lower righthand corner it shows a truckload of corn being dumped into a trough that is laying on the ground. From there it is elevated through the pipe by means of an auger to the small bin at the top of the scaffold. It falls from there via gravity to a point just at the car door and right above the grain doors. At that point it falls to a portable belt which is approximately three feet long with large spools on either end and connected by a belt. It is commonly referred to as a slinger. The spools and the belt revolve at high speed, and the corn falling onto that belt is thrown into the ends of the car. It is mounted on a swivel so that it may be turned, and each end of the car can be loaded without any difficulty.

Incidentally, there is no trimming necessary in the [fol. 762] loading of a car of this type. You will notice also on the picture that there is an adequate supply of grain doors in the lower lefthand corner.

Q. Have you seen this and other portable loading operations along the Kankakee Belt?

A. Yes, I have.

Q. With your own two eyes?

A. Yes, I have.

Q. Is there an elevator at Reddick?

A. Yes, it was abandoned, but it is there.

Q. There is an elevator near this facility?

A. Just across the road, yes.

Q. Will you explain and will you indicate other portable loading facilities with which you are familiar along the Kankakee Belt?

A. Well, the elevator facility at Reddick depicted in the picture is operated by the Cabery Farmers Elevator at Cabery, Illinois. Their own elevator is served by the Illinois Central, but they truck eleven miles to this facility to load their corn. At Union Hill, Illinois there is another similar arrangement. It is jointly operated by the Herscher Grain Company, who are also on the Illinois Central at Herscher, Illinois. They truck seven miles to Union Hill, and the Quaker Oats Company, who are located at Bucking-[fol. 763] ham, Illinois on the Illinois Central, and they truck approximately twelve miles to that facility at Union Hill.

There is another portable loading facility that is at Goodrich, Illinois, which is two miles east of Lehigh, and it is operated by the Irwin Grain Company, located at Irwin, Illinois, on the Illinois Central, and they truck seven miles to that facility.

There is another portable loading facility at Streator, Illinois, just southeast of Streator about one mile. It is operated by Mr. Ike Barrett, who is located at Moon Station, Illinois, on the Santa Fe, and he trucks four miles to that facility. There is a portable loading facility on the passing track at Dwight, and it is operated by Mr. Walsh of the Walsh Grain Company in Campus, Illinois. His own elevator there is served by the Wabash, but he trucks nine miles to Dwight.

At Streator, Illinois, the Melody Grain Company, operated by Mr. Melody of Munster, Illinois. He has a grainovator. That is a little different than this type of thing. That operates on suction, and he loads his corn into boxcars on

the New York Central right behind the depot. He doesn't have a lease; they just let him use it.

The Quaker Oats Company also have a portable loading facility on a passing track at Dwight, and they load through that facility from their elevator at Odell, Odell, Illinois on [fol. 764] the GM&O, which requires a trucking of ten miles.

Q. Are these just the facilities with which you have had an opportunity to become familiar, or is this an exhaustive list so far as you are concerned?

A. No, these are only the ones I have become familiar with. There may be others; I don't know.

Q. You mentioned the facility at Goodrich. Is there also an elevator located at Goodrich in addition to the portable loading facility?

A. Yes, but it, too, looked deserted. The spouts were rusty coming out of the side.

Q. Turning to your exhibit marked for identification 41, will you explain what that exhibit shows?

Mr. Murphy: Your Honor, I am going to object to the introduction of the last page of Exhibit Number 41 on the ground that it doesn't show anything in regard to present rates, it doesn't show anything in regard—that would bear on the lawfulness of the New York Central's rate.

Mr. Freeman: The exhibit as a matter of fact does, in column 2, as Mr. Springrose will explain, show present rates to Chicago. I assume that Mr. Murphy's objection is that it shows rates to Chicago, but the main reason this was put in is that there was considerable discussion by the New [fol. 765] York Central and the General Foods witnesses about the level of proposed rates into Chicago, and this is a record of what those rates actually were, and we think the record should be clear on that point. This shows the present rates to Chicago, and as Mr. Springrose will explain, it shows rates which have been reduced and rates which have been proposed for reduction, and I think his testimony will make it quite relevant to the proceeding here.

Mr. Murphy: The point is, your Honor, the question of the proposed rates, and that is all that I am directing my objection to, is the showing of proposed rates which may or

may not become effective. Certainly those rates have no bearing on the lawfulness of this rate.

The Witness: I can fill the historical background of those proposals to this point.

Mr. Murphy: The historical background of the proposals is completely immaterial to this case.

Exam. Dahan: Your objection is overruled at this time. If there is any further objection later on, you may raise it. You may continue.

By Mr. Freeman:

Q. Will you proceed to explain your exhibit?

A: The map is attached to this exhibit simply for clarification. The origins used on the next page in the rate ex-
[fol. 766] hibit are underscored on the map so that they might be more easily spotted and located and the general area can be determined. The rate exhibit shows origins from various railroads serving the same territory and their rates to Chicago. These origin stations are representative points in the area.

Q. That is, you have not attempted to show all origins in Illinois to Chicago.

A. Oh, no.

Q. This is merely a representative showing.

A. There are many others. From Wilmington Mine on the Santa Fe, which is 55 miles to Chicago, the interstate rate to Chicago prior to December 15, 1956, has been—as increased through Ex Parte 206A, was 20 cents. In column 4 you will note that the Santa Fe proposed a rate to Chicago on an interstate basis of 10½ cents. From Verona on the Santa Fe, 71 miles from Chicago, the rate is 18 cents, which is an IP rate when used in the trading at Chicago, predicated upon subsequent movement to eastern territory. They propose a rate to Chicago on an interstate basis of 12 cents. Ottawa, Illinois, on the CB&Q, also has the 16 cent rate, IP rate, to Chicago. They propose 10½ cents on an interstate basis to Chicago. They are 80.9 miles from Ottawa to Chicago. Grand Ridge on the CB&Q has the same 18 cent IP
[fol. 767] rate with a 13 cent rate proposed, and it is 89.6 miles to Chicago.

Q. Mr. Springrose, maybe to expedite the proceeding, if you will run down and give the mileages down through column 8, which will carry you through the point where you have proposed rates, and then you can explain your item 9. Can you give us the mileages for the appropriate line?

A. All right. Andres is 93.7; Yeager is 78.4; Gardner is 65 miles; and Streator is 96 miles. These are rail miles to Chicago.

Q. On line 9 you have a different comparison. Will you explain that, please?

A. Spring Valley on the Chicago & North Western is 109.1 miles to Chicago. They have the 18 cent IP rate to Chicago, and they have already established a 14 cent rate to Chicago on an interstate basis. This 14 cent rate into Chicago is still subject going to eastern territory to the local rate from Chicago as minimum before the reshipping rate from Chicago can be engaged, and therefore that 14 cent rate would require a pad of 4 cents before the reshipping rate from Chicago could be utilized. The same thing holds true for Morris, Illinois on the Rock Island, which is 81.3 miles to Chicago. Their interstate rate is 13 cents. The pad on that rate would be 5 cents, bringing it up to the total [fol. 768] of 18, and Ballou or Langham, on the Rock Island, is 76.1 miles to Chicago, and it is the same as Morris. Ballou on the Wabash is 51.1 miles to Chicago. It has a 20 cent rate to Chicago on an interstate basis, and they have not published any lower interstate rates, nor have they issued any proposals to lower their interstate rates.

Q. Are the rates shown in column 2 of long standing duration in the rate structure?

A. In the rate structure, they are, yes, sir. The levels vary depending on the time.

Q. That is, they vary by virtue of general increases.

A. Yes, and minor adjustments.

Q. While on that subject, are the rates to Kankakee which were applicable before December 15, 1956 of long standing duration?

A. Yes, they were.

Q. From approximately what date were those reshipping rates established?

A. The reshipping rates from Chicago?

Q. No, on the Kankakee Belt from Kankakee.

A. The reshipping rates from Chicago and from Kankakee to the east were established under the present basis in 1921.

Q. Is there anything else you would like to say about Exhibit 41?

A. I have nothing further.

[fol. 769] Q. Did Cargill sell corn to General Foods at Kankakee in 1956?

A. Yes, we did.

Q. How much corn was sold at Kankakee, to General Foods?

A. During 1956 we sold General Foods 410,000 bushels of corn from our Chicago elevator and 295,000 bushels of corn that was reconsigned off track at Chicago. It came into Chicago by rail and was diverted to them from Chicago.

Q. Did this corn have x-barge or x-rail billing behind it?

A. Of course the reconsigned grain off track moved on its through waybill, and it did have ex-rail grain and all the 410,000 bushels sold to General Foods in 1956 from our elevator also had x-rail billing, and the reason for this is that General Foods has the buying policy that they specify rail billing, and they categorize them in four types actually when they buy from the Chicago market. One they term special billing, which is grain that originates on the IC or the GM&O,W, under the present level of rates, 25 cents or better paid into Chicago. Another category is what they term six line billing, which are those IC and GM&O origin stations that do not fall into the special category, and in [fol. 770] addition to those two, Wabash, New York Central, C&EI, and Milwaukee Road origin stations. Another preference they have is Iowa TM billing, again preferably originating on the Illinois Central, and their last preference is barge billing, and it prevails with us, and I assume it prevails with the other people in the Chicago area.

General Foods only buy Chicago elevator corn when they cannot meet their requirements with country run corn.

Mr. Murphy: I object to that, your Honor. This witness may know and may be able to testify in regard to what

orders General Foods placed with Cargill, but in so far as testifying as to an over-all policy or testifying as to what General Foods only does, I certainly suggest that he is incompetent—

By Mr. Freeman:

Q. Did they specify the preferences you have just given to Cargill?

A. Yes, they do. The first three may not be in the proper numerical order by their preference, I don't know, but barge billing always comes last.

Q. And that you know.

A. That I do know.

Q. Where is the destination of the preponderance of Cargill's x-barge billing from Chicago?

[fol. 771] A. The preponderance of our x-barge billing from Chicago is shipped from our elevator to points on and east of western termini, Buffalo, Pittsburgh—I might elaborate, Norfolk common points, or Virginia City's common points, Baltimore and Baltimore basing points, Philadelphia, the Del Mar peninsula, and all of New England territory.

Q. You sell to processors at those points of corn products?

A. We do, yes, many of whom compete with General Foods.

Q. Have you had an opportunity to check the application of the 6 cent rate on corn to Port Cargill, referred to in Exhibit 18?

A. Yes, I have.

Q. Proceed.

A. The 6 cent rate shown in Exhibit 18 from Winstead, Minnesota to Port Cargill, Minnesota is in no way comparable to the 5½ cent rate to Kankakee. First of all, I would like to say that the way I compute the mileages from Winstead to Port Cargill, they are 53 and not 59 miles, using the Glenwood Junction, which is the actual physical operation of the Minnesota Western Railroad, and that makes the per car mile earnings at $1.13 based on a hundred cap car, 100,000 pounds. In addition to that, Winstead is 40 miles from Minneapolis. It is published on a local intrastate, nontransit basis, and the rate is approved

[fol. 772] only by the Minnesota Railroad Commission under their tariff number 88. It carries an expiration date of December 5, 1958. The rate from Winstead, 40 miles, is 6 cents, and going west from Winstead the rate is scaled upward from Lake Lillian, for example, 85 miles to Minneapolis, and the rate is 10 cents, and the farthermost point is Brimsburg, 100 miles from Minneapolis, and the rate is 12 cents. As I said before, this is a local intrastate rate and may not under any circumstances be used on an outbound transit shipment. If transit is desired, the local interstate rate, which is at a higher level, must be paid into Minneapolis or Port Cargill at the time of unloading, and further, when reshipping from Minneapolis, the pad requirement there, the difference between the local rate and the reshipping rate from Minneapolis, is 21½ cents, so that that actually is the minimum rate under a transit shipment beyond Minneapolis or Port Cargill.

Q. That is by virtue of the Fourth Section rule.

A. Yes.

Q. Have you had an opportunity to determine whether the 5½ cent rate from points on the Kankakee Belt west is applicable to points in central territory via the Illinois Central from Kankakee?

[fol. 773] A. Yes. Corn may originate on the Kankakee Belt and move at the 5½ cent rate to Kankakee, subject to milling in transit, and move from Kankakee via Illinois Central to Chicago or to Indianapolis, thence connecting railroads other than the New York Central to various destinations in central territory.

Q. In which event the New York Central would have handled the corn only to Kankakee.

A. Yes, and made the transfer to the Illinois Central at Kankakee.

Q. The question was raised, when Mr. McClintock was on the stand, with respect to Exhibit 39. Have you had an opportunity to determine the tariff reference authority for the showing on sheet 2 of that exhibit?

A. Now, I am at a loss to know who they were talking about when they said there were no products shipped from Chicago by that processor. Would you state that, please?

Mr. Freeman: Off the record a minute.

(Discussion off the record.)

By Mr. Freeman:

Q. Can you give tariff references which show the application of the rate from Kankakee, points originating on the Kankakee Belt, to Chicago outbound from Chicago to destinations east, the corn being processed in Chicago?

[fol. 774] A. Yes. The New York Central 701A, CTR 535, CTR 245.

The actual transit provisions at Chicago are granted in CTR 413.

Mr. Murphy: If I may interrupt for a minute, I would like to state that that is not the answer to my question. The answer to the question was what tariff authority permits this large processing plant at Chicago that transits its product. I asked that of Mr. McClintock, and Mr. McClintock was the one who used the phrase "large processing plant at Chicago." So it would take some indication of what products are produced by that processor to determine whether or not the tariff applied.

By Mr. Freeman:

Q. Is the tariff reference you gave support for the application of the Kankakee proportional rate to destinations east via Chicago to someone processing corn into corn products?

A. Yes.

Q. Are there points in official territory at which there is a transit charge for corn processing, such as has been mentioned on the record with respect to Indianapolis?

A. Transit charges in central territory are the rule rather than the exception, and they are quite widespread, and they range from 1 cent and ½ to 4 cents a hundred.

Q. And are generally applicable.

A. Yes.

[fol. 775] Q. The question has also been raised on this record with respect to the New York Central mileages from Chicago via the New York Central to destination points shown on Exhibit 15 of Witness Tascik. Are you in a position to supply those mileages?

A. Yes, I have them. In the same tariff references were used for these mileages as are shown on the exhibit. Direct line mileage from Chicago to Albany, New York, is 811.6; Boston, Massachusetts, 1011.6; To New York, New York, 948; to Rochester, New York, 603.6; Syracuse, New York, 667.9; Utica, New York, 720.9; Buffalo, New York, 521.3; Cleveland, Ohio, 340.1; Detroit, Michigan, 280.1; Indianapolis, 193.6; Kalamazoo, Michigan, 156.4; Kendallville, Indiana, 142.1; Pittsburgh, 478.3; Toledo, 233.6; Youngstown, Ohio, 414.8.

Q. Has Cargill had experience with paper grain doors?

A. Yes, we have had.

Q. Could you explain very briefly what that experience has been?

A. Well, our experience with paper grain doors coming in from the country are not as satisfactory as wooden doors because of the delays that we often encounter because of reasons attributable to the paper door. They must be properly installed, coming from the country, because of the motion of the car in transit, so they invite [fol. 776] leakage and a loss in transit. They also bulge quite frequently to the point where they bind the outside door, that it may not be opened.

Q. What happens in that situation?

A. Well, originally when the car comes into Chicago, if it is placed on the inspection track, and the door cannot be opened, the inspectors, the federal or state inspectors, cannot gain access to the grain for their sample, and they therefore order the car or ask that the car be put on a rip track so that the door can be opened by someone in the yards.

Q. Who moves it to the rip track?

A. The inbound carrier. He then moves it back to the grain inspection track where it is sampled.

Now, it happens at times, too, where after we have diverted a car from a grain inspection track to our elevator, because of the handling in the Chicago District, a door will bulge, and it gets to the elevator, and we can't get the door open there, either, and there we have one of the two choices, forcing it out ourselves with men who aren't fa-

miliar with—well, they just don't know how to do it, or again, sending it back to some rip track to have the door opened so that we might unload it.

Q. Who moves it to the rip track in that instance?

[fol. 777] A. The railroad does.

Q. Have you had any experience with damage to the car as a result of the use of paper grain doors?

A. Well, yes. I have seen doors that were sprung because of the weight that was exerted outwardly on the door, and even after the grain was taken out of the car, the door was sprung, and it would not close tightly, and therefore it could not be used again for grain reshipments until the door was straightened out.

I have also seen paper grain doors pull out the door posts from the sides of the door on a boxcar because of their construction and the difficulty in getting at them or getting them out, so that the grain may be unloaded.

Q. It has been Cargill's experience that there is more of this damage to the car and more of—

Mr. Murphy: I am going to object to this. I don't think this is appropriate here, to examine him without qualifying him on the basis of study, whether it was on a scientific basis.

Mr. Freeman: I am limiting my question to what he knows and what he knows with respect to Cargill's experience. I tried to be very careful in that regard, Mr. Murphy.

Mr. Murphy: Your Honor, I object to it on the grounds [fol. 778] that any sample—

Mr. Freeman: If you would like me to take the time to go through and qualify Mr. Springrose, I can do it.

Mr. Murphy: I have no desire for you to take time—

Exam. Dahan: I am going to overrule the objection. If you have evidence to the contrary, you can present it on rebuttal.

Mr. Murphy: At the eleventh hour it is going to be difficult to come in with a sample of the experience of the railroads on grain doors to show whether or not this is representative or whether this is a few horrible examples that he has found.

Mr. Freeman: May I point out for the record that the use of paper grain doors was raised by the New York Central, not by us.

Mr. Murphy: We merely mentioned that we use them.

By Mr. Freeman:

Q. Will you continue? I think you were about completed with explaining the damage. I don't know whether you had said anything about damage to the door jams.

A. Well, paper grain doors, as opposed to wooden doors, I might explain first that a wooden door, the total of the full door on the side of a car may and usually is nailed in place with no more than 20 to 25 nails to hold it in. A paper grain door, on the other hand, often requires a [fol. 779] hundred nails or more, and the grain door construction people have now designed a door that has steel straps that extend beyond the door jamb, as the first door did, back along the side of the wall of the car—

Q. You are now speaking of paper doors.

A. I am speaking of paper doors—from where it is further nailed in order to try and stop the bulge that I was talking about before.

Now, on an automatic unloading facility, such as we have in Chicago, when a car is spotted to be tipped and unloaded, there is an hydraulic press that comes up and pushes against the grain door, pushing it into the car. On a wooden board door the door remains rigid, and there are only 20 or 25 nails that must hold, and it all pushes back at once, and the nails come straight out from the door jamb. On a paper door, however, when this press pushes into the center of the paper door, it is only paper with steel straps, and the steel will buckle in the middle and bend inward, but it won't break, and the result is that something has to give; usually if the nails do come out, they are coming out at a 45 degree angle or more rather than coming straight out, and if they are in there real good and the door posts in the car are weak at all, it pulls the door post right out.

[fol. 780] Q. I take it from your previous testimony that you have been along the Kankakee Belt and seen many of the elevator facilities along the Kankakee Belt.

A. Yes.

Q. How many of those elevators and points along the route there do you estimate that you have seen, just roughly?

A. The elevators themselves?

Q. Yes, the whole area. How many of these sidings have you seen? Eight or 10 or 12 or 15?

A. I would say 10 to 12, yes.

Q. Did you see when you were along the Kankakee Belt a supply of wooden grain doors at all of these elevators?

A. Yes, sir, every one, except those that I said before were abandoned or unoccupied.

Q. Large or small supply, would you say, for a country elevator?

A. Well, I think the supply in this picture is representative of what we saw.

Q. I think the record shows that Cargill buys exclusively from the country elevator. Is that your view?

A. That is correct, yes.

Q. In such a transaction does the country elevator always of necessity command a margin for the service it renders?

A. Yes. He doesn't work free.

[fol. 781] Q. And what is it your experience that that margin amounts to on the average?

A. I would say on the average of 1 cent and ½ to 2 cents a bushel. You are talking now about just the normal margins and no other cost.

Q. Yes, no trucking costs and nothing else.

A. All right.

Q. Does one country elevator in the normal operations buy from another country elevator?

A. No.

Q. Or do they operate pretty much as separate entities in their own territory?

A. They all have their own form of producing friends, and they buy from producers and not from one another.

Q. So that a rail country elevator buys from the producer and moves the grain into his elevator for movement out.

A. Yes.

Q. Then I take it the country elevator does not have the expense of a charge to an elevator for the handling of grain such as the river elevators, Cargill's river elevators have, in moving grain via the Illinois River?

A. No, they do not.

Mr. Murphy: I am sorry, I did not hear the question.

(The question was read.)

By Mr. Freeman:

Q. Is corn located in a processing plant at Kankakee or [fol. 782] Indianapolis or Paris or Decatur, the points named in this record, in the same position as corn in an elevator at Chicago?

A. No.

Mr. Murphy: Well, now, I am going to object to this. This witness has been qualified as a traffic man, not a—

Mr. Freeman: I am talking about traffic. If you let me finish, I think that will be clear.

By Mr. Freeman:

Q. What happens to the corn at Chicago in an elevator, to put it in a comparable position to corn—I am not talking about price now—to corn located in a processing plant at Kankakee or Indianapolis?

A. It must be loaded from our elevator into a boxcar and transported to that processing plant at Kankakee or Indianapolis.

Q. Or to some other processing—

A. Or some other processing plant where it is unloaded, and then it is in the same position as the other corn you referred to.

Mr. Freeman: I have no further questions.

Mr. Legg: I have one question.

By Mr. Legg:

Q. Mr. Springrose, what proportion of the total grain originating from the New York Central comes to the area [fol. 783] served by the Kankakee Belt from Kanakee to Morontz?

A. Potential origination? I would say 5 to 7 per cent.

Mr. Murphy: I object to that. The witness is not qualified to talk about potential production and potential shipments or potential source of supply.

Exam. Dahan: Objection sustained.

By Mr. Legg:

Q. Mr. Springrose, are you familiar with the area served by the New York Central Railroad?

A. Yes.

Q. Do you know generally what the nature of the geography is of those areas?

A. Yes.

Q. And what industries—what agricultural production occurs in those areas?

A. Yes.

Q. I will repeat my question now.

Mr. Murphy: Your Honor, I will restate my objection. I don't think he has been qualified by those questions.

Exam. Dahan: I agree.

Mr. Legg: I have no further questions then.

Exam. Dahan: You may cross examine.

Cross examination.

By Mr. Murphy:

Q. You gave tariff references that were available to someone processing corn into products of corn in Chicago. [fol. 784] A. Yes.

Q. Is there any dry corn processor in Chicago?

A. Surely; feed manufacturers process corn in that they mix it into feed, and that is dry corn.

Q. Anyone processing corn into corn products, and I use your language, at Chicago?

A. Dry processor? No, not to my knowledge.

Q. Do you know of anyone as a practical matter that could bill the corn under the tariff provisions applicable at Chicago?

A. Surely.

Q. Who would that be?

A. Any of the feed manufacturers here, and in addition to that, Corn Products, because they ship corn gluten feed and corn gluten meal which are defined in the tariffs that I recited before, and the authority applies via Chicago.

Q. Corn gluten feed and corn gluten oil, was that—

A. Meal.

Q. You indicated that the 6 cent rate from Winstead, Minnesota to Port Cargill—

A. Yes.

Q. —is not comparable. Now, can corn move on that 6 cent rate for the distance, you state that it is 53 miles, and our record shows that it is 59, but can it move for [fol. 785] that distance from Winstead, Minnesota to Port Cargill and move from Port Cargill via lake vessel at the 6 cent rate?

A. No, Lake vessels don't go to Port Cargill.

Q. Thank you, sir.

A. It may, however, once unloaded, thereare no further costs attributable to the rail transportation aspect, and therefore it is not comparable.

Q. I am just asking you some questions, and Mr. Freeman is very able. He will bring out what he wants to bring out, Then the 6 cent rate would apply on grain moved from Winstead to Port Cargill even though that might be all of the rail transportation that was ever performed on such grain.

A. It would move from Port Cargill at a local rate.

Q. No. Does grain move from Port Cargill via water?

A. At a local rate, yes.

Q. Does it move from Port Cargill via a water charge?

A. A local rate, yes.

Q. All right, and could it move via water all the way out of the country without having any rail transportation on it after it left Port Cargill?

A. Yes, that is entirely possible.

Q. And do you move grain from Winstead to Port Cargill and then further it by water from Port Cargill?

[fol. 786] A. Yes.

Q. Did you sell any corn to General Foods during 1957?

A. Yes.

Q. They are still a customer of yours.

A. I hope they will continue to be.

Q. Can you tell me how many of these portable elevators that you say you saw are operated by elevators located south of the New York Central?

A. South of the New York Central.

Q. Yes.

A. Cabery, Illinois is south, Moon Station, Campus, Herscher, Buckingham, Irwin, Munster, and Odell. They all are.

Q. They are all south of the New York Central, are they?

A. Right.

Q. Are those elevators on team tracks for the most part?

A. Is this an elevator?

Q. I mean these loaders on team tracks.

A. They are on side tracks. Some of them have connections at both ends, and some of them do not. They are not on the right of way, no. They are on side tracks.

Q. In other words, they could be on what would be characterized as a team track on which there would be no need for a shipper to get a lease before he could load or unload at such tracks?

[fol. 787] A. I suppose so. I was going by previous testimony that 30-day leases were given, and that is why I brought that feature into it. If you don't need a lease on a team track—

Q. Do you know whether these people pick up their loader and take it with them when they have loaded their shipments for that particular day?

A. No, you can't pick up the scaffolding on this picture and take it with you. It is anchored in the ground.

Q. Were they all like that, identical, or was there some variation?

A. There was some variation.

Q. Some of them weren't anchored in the ground.

A. That is right. Whether or not they take them with them when they go home at night, I can't answer. I don't know.

Q. I notice there is a shovel hanging in that picture. Do you know what that is used for?

A. No. It was hanging there when I was there, too.

Q. It wouldn't be used for trimming, would it?

A. No. Trimming is not necessary with a portable sling. The only time trimming at a country level is necessary is when grain piles up in the middle of the doorway and does not fall back to the ends of the car. Then you must [fol. 788] get inside and shovel it to one end or the other so that you can put more grain in. With this sling it will throw corn 20 feet. It isn't necessary.

Q. Did they all have slings, all these elevators that you saw?

A. Yes, yes, they all had slings.

Q. Or loaders.

A. All the loaders—except the one where there was this Vacuator, and that did not have a sling—the Grainovator in Streator, that is a suction thing. There was no sling in that. There again, though, the suction throws the grain.

Mr. Murphy: I have no further questions.

Mr. Freeman: I have no further redirect.

OFFERS IN EVIDENCE

Exam. Dahan: Exhibits 40 and 41 will be received in evidence.

Mr. Murphy: We have an objection.

Exam. Dahan: You have that objection connected with the exhibit. If they are not in effect we won't use them, but by the time this decision comes out, there will be some action taken on those applications, I presume.

Mr. Murphy: They are not applications. They are merely matters pending before rate committees. They are not even filed with the Commission.

Exam. Dahan: We only use rates that are filed with [fol. 789] the Commission in any report, so unless they have been filed, they probably won't be considered.

Mr. Chartrand: Then to the extent to which that page does show rates actually in effect the objection does not go to that.

Exam. Dahan: Well, in so far as the rates are in effect, they are received.

(Protestant's Exhibits Nos. 40 and 41, Witness Springrose, were received in evidence.)

Exam. Dahan: You are excused.

(Witness excused.)

Mr. Freeman: That concludes my witnesses, Mr. Examiner.

J. S. CHARTRAND was sworn and testified as follows:

Direct examination.

The Witness: My name is J. S. Chartrand. I am manager of the transportation department of the Board of Trade of the City of Chicago and am in my third year with this organization. Prior to that time I was seven years as transportation assistant for the Board of Trade at Kansas City and have had continuous experience in transit and transportation matters in the milling business, grain business, feed business, since 1936.

Prior to that time I was superintendent of operation [fol. 790] for one of the larger trucking firms in the country.

I am familiar with the issues in this case and have prepared a number of exhibits, either by me or under my supervision, which to my best knowledge and belief are true and correct, and if the examiner please, I would like to identify these as I go.

By and large the exhibits in many respects speak for themselves, but there are instances where I would like to make brief comments with regard to an exhibit but will not spend undue time with them.

The first exhibit, which is a map which reads in the lower righthand corner "Map A."

Exam. Dahan: That may be marked for identification Exhibit Number 42.

(Protestant's Exhibit No. 42, Witness Chartrand, was marked for identification.)

The Witness: This is a map showing this section of Illinois. We wanted to bring out the general location of the New York Central and the river and its relationship to Kankakee and Chicago.

Prior to the effectiveness of this 5½ cent rate, the general flow of the traffic of corn was by truck from the area around the New York Central to the river loading ports, thence by barge to Chicago as the barge unloading port, and from that point proceeded east by rail.

[fol. 791] Now, in connection with the competitive form of transportation, namely barge and rail, the combination of rates over Chicago applied, namely, the barge rate to Chicago plus the proportional rate to the east. There was no observance of the flat rate from Chicago as a minimum. Therefore, if a railroad seeks to meet competition, they likewise must have Fourth Section relief from the flat rate at Chicago and intermediate points in Indiana.

Now, I would like to make a brief statement with regard to our position in this matter. We feel that the railroads should have a fair opportunity to compete for traffic originating in this territory destined to the east, but when they do, that they must comply with the existing law in all respects.

Our two objections to the rates existing or published by the New York Central on which they here seek Fourth Section relief go to the level, which we feel is low, and secondly, as stated before, our objection to it applies only on corn when milled in transit.

So therefore we occupy somewhat a split position, not being wholly for nor against; we feel that if the carriers are to meet their competition at all, which we feel they are entitled to do, it must be in full compliance with the existing law.

[fol. 792] The next exhibit, which will be Exhibit Number 43—

Exam. Dahan: It may be so marked for identification.

(Protestant's Exhibit No. 43, Witness Chartrand, was marked for identification.)

The Witness: —is headed at the top, "Capacity of principal grain elevators, mills, and malt houses in the Chicago area on June 15, 1957." This lists all of our facilities at Chicago and indicates those that are located on the water and have access to barge service. Thirteen elevators have barge unloading facilities with a total capacity of 58,283,000 bushels. We have tremendous investments in Chicago built upon the river and its low cost transportation, which gives Chicago an opportunity to utilize its natural advantage of being on the Great Lakes, on the inland waterways, as well as being able to be served by truck and rail.

The next exhibit is a 7-page exhibit to be numbered 44, entitled "Statement of grain receipts at the Chicago market, 1935 to 1957 inclusive, via each mode of transportation."

(Protestant's Exhibit No. 44, Witness Chartrand, was marked for identification.)

The Witness: I realize this particular proceeding here is confined to corn, but we have listed the receipts of the major grains and total grains for the purpose of showing [fol. 793] that the barge receipts at Chicago are substantial; it is important to us, and we have a very definite interest in any system of rates that is set up that would have a ruinous effect upon that mode of arrival. For example, page 1 indicates that 21 per cent or better of our wheat is received by barge. Page 2, 26.73 per cent of our corn business arrives by barge, and so forth on pages 3 and 4, revealing oat and soybean figures, 5, an accumulation of the major grains, and 6, the total arrivals at the market. Page 6, for example, indicates that better than 28 per cent of all of our grains arrives via barge. It is important to us in our method of doing business.

Page 7 brings those previous pages up to date, reflecting the 1957 figures, and at this point I would like to refer back to page 2 for the purpose of narrowing this exhibit

down to corn. Page 2 shows the rail receipts for 1956 as 68,702,000 bushels. Page 7 reflects that in 1957 there was received by rail corn in the amount of 99,396,000 bushels, an increase of 44.7 per cent.

Going to the total receipts of corn at Chicago via all modes of transportation, we find that on page 2 in 1956, 98,037,000 bushels were received by all forms, and in 1957, 137,577,000 bushels, or an increase of 40.3 per cent. That [fol. 794] follows directly some of the previous testimony that 1957 was, in so far as receipts and directly reflecting the 1956 corn crop which matured late in the year, a great deal larger than the year before, and I believe that our receipts at Chicago, total receipts of corn, are pretty indicative of about the increase of the 1957 crop over the 1956 crop, 40.3 per cent.

However, when we examine the barge receipts for 1956, we find 26,210,000 bushels, whereas in 1957, 34,199,000, or about a 30.5 per cent increase. In other words, the barge receipts at Chicago did not keep pace with the rail receipts nor with the total receipts at the market via all modes of transportation.

The next exhibit is a three-page exhibit which should be marked Exhibit 45, headed "Annual total rail shipments from Chicago."

(Protestant's Exhibit No. 45, Witness Chartrand, was marked for identification.)

The Witness: We thought it pertinent to show where our shipments go and the extent to which they go eastbound and shows a real interest in this proceeding on our outlets of cars. Page 1 is a statement of the annual total rail shipments from Chicago in all directions. Page 2 are eastbound rail shipments by grains, and on page 3 the percentage of all of our shipments that move eastbound. It [fol. 795] will be noted that in 1956, 64 per cent of the corn moved to the east, and the other grains are shown accordingly. Therefore we have a real interest in grain that comes in by barge, the extent to which it moves to the east, as reflected here, and in the rates that the railroads might establish to meet that competition.

Next is a one-page exhibit to be marked Exhibit 46, headed "Cars inspected versus cars unloaded, on corn only."

(Protestant's Exhibit No. 46, Witness Chartrand, was marked for identification.)

The Witness: Here we set out the extent to which cars that are inspected in Chicago are unloaded in Chicago and reflect a six-year average of 78.7 per cent.

Next is an exhibit to be marked 47, a ten-page exhibit, which reproduces the tariff schedules we have been talking about here.

(Protestant's Exhibit No. 47, Witness Chartrand, was marked for identification.)

Mr. Murphy: Mr. Chartrand, unfortunately I am not quite as familiar with these as you are, and I wonder if you can take these a little slower so I can keep up with them. It is very interesting, and I don't want to miss it.

[fol. 796] The Witness: Off the record, please.

(Discussion off the record.)

The Witness: The next is a ten-page exhibit wherein we have set forth on pages 1, 2, and 3 the amendment to the New York Central tariff which became effective December 15, 1956, wherein they established in their west end tariff the 5½ cent rate.

At the same time there had to be established similar tariff provisions in CTR tariff 535C, which published the proportional rates from Chicago and Kankakee to the western termini points.

On pages 7 and 8 was the corresponding correction made in CTR tariff 245 which would make the initial 5 cent rate applicable to points east of the western termini. All three tariffs became effective December 15, 1956. On pages 8 and 10 are excerpts from the New York Central tariff extending the 5½ cent provision to the CTR territory. I would like to go back to page 2 and refer briefly to circle reference 400, and I will read it in part.

"Rate applies only on corn and corn products when milled in transit." There we have a dual commodity de-

scription, corn and corn products, with the limitation "applies only when milled in transit."

On page 3 we find the source of circle reference 400, [fol. 797] at the lower part of the page, headed "Corn as per grain list in Section 1 of Agent H. R. Hinch's freight tariff 600 HICC Number 4644." When we look at the generic heading of what is to follow, we find that it applies on corn as per the grain list, not the grain products list, but the grain list, and there is enumerated thereunder quite a few stations, all of which are those between Morontz and Van's Siding are included, plus another station or two in there with which we are not concerned.

Therefore we see the establishment on December 15 of the 5 cent rate, subject to circle reference 400, which has a dual commodity listing, "this applies on corn," and yet when we get down to the final analysis as to how the tariff does apply, it only applies when the grain is ultimately—when the corn is ultimately milled some place in transit between origin and final transit destination.

Page 5 is an excerpt from CTR tariff 535C which permitted the utilization of the proportional rate from Kankakee to the western termini points, and I would refer to Pittsburgh and Buffalo as typical thereof.

On page 6, which is an extract from page 4 of the tariff, we find the note, "B-6," which states, and I will read only in part, "Proportional rate from Kankakee will apply on corn and on the following products, in carload, without [fol. 798] regard to the existence of a single factor, joint through rate from NYC stations West Kankakee to Morontz," and there is enumerated thereunder a number of commodities on which this rate only applies. There we have the specific application of a competitive rate to meet barge competition only applying to—on these commodities here. It is interesting to note that this tariff provision does not say anything with regard to only when milled in transit. No language is here. Therefore, the previous tariff we referred to, which was the New York Central tariff 701A, page 2 thereof, the restriction in the New York Central's individual line tariff has projected itself into CTR tariff 535, which an unwary user thereof

would have no knowledge that the proportional rates contained therein are restricted only to apply when milled in transit.

On page 8 is an excerpt or a reproduction of page 2 of CTR tariff 245 which at the bottom of it, under the general exceptions to application of rates, we have a new item, 275, exception to the application of rates on corn and the products thereof.

Mr. Erickson: Would you correct that to read 279?

The Witness: 279. The stations from West Kankakee to Morontz are listed and applies only on the enumerated products, but in this eastern proportional tariff, naming [fol. 799] the proportional rates from Kankakee and Chicago to the Trunkline Territory, we find, applied only when routed via Kankakee and milled in transit. It is this specific restriction against the universal use of all corn to which we raise strenuous objection.

Page 10 hereof is an extension of the destination territory—to the CTR territory which became effective July 30, 1957, and again the generic heading reads "Corn as per grain list of Section 1 of CTR tariff 600-H."

The next exhibit to be marked 48 is a four-page exhibit which is a statement of grain movement from the Kankakee branch of the New York Central Railroad Company from 1950 to June 30, 1957.

(Protestant's Exhibit No. 48, Witness Chartrand, was marked for identification.)

The Witness: On page 1 thereof, the upper section is an excerpt from the respondent's reply, page 7 thereof, showing the entire grain movement from elevators on the Kankakee Belt, 1950 to 1953 inclusive.

The lower part of the page is the extract from page 11, showing the carload car movement from the stations here involved and the destinations to which the corn went for the first six months of 1957.

Page 2 of the exhibit is an excerpt from page 6 of the respondent's reply showing carload corn movements, 1954, 1955, and 1956 from this line of railroad and where it [fol. 800] went.

Page 3 of the exhibit is a summary of the foregoing. I would like to make corrections in the last column due to the fact there are some slight errors in addition by the respondents in the showing here as to the car movement for the first six months of 1957. They are small in nature, but they would be as follows, and I refer now to page 3, the last column: Where Blair reads 255, kindly change that to 249; Lostant, reading 110, should read 115; Milla, reading 112, should be changed to 120; Priscilla, reading 52, should be changed to 55; and the total should be changed from 1905 to 1915.

Mr. Erickson: Would you read the Milla figure back?

The Witness: Milla should be changed from 112 to 120.

Now, after those changes are made, which are slight, we would like to call your attention to the first line, Blair, and remind you that the years 1950 to 1953 inclusive cover entire grain movements as taken from the previous statements. The years 1954 to 1957 inclusive, the last four columns, have an asterisk which indicates at the bottom "Corn movement only." With that in mind, Blair, it will be seen, the largest number of cars they ever had out of that station in the previous seven years was 69 cars in [fol. 801] 1955, and in the first six months of 1957 shipped 255 cars.

Mr. Erickson: 259 is correct.

The Witness: Excuse me, 249. Referring to Dwight, in the seven years prior to 1957 there was a total of 281 cars shipped out of that station, whereas in the first six months of 1957, 244 cars were shipped. Considering Milla, the first seven years, 48 cars were originated, and in the first six months of 1957, 120 cars.

Now, looking at the total, in the years 1950 to 1953 inclusive, a four-year period, covering all grains, the New York Central from that entire line shipped 1,722 cars, whereas in the first six months of 1957, they shipped 1,915 cars of corn alone. Considering now the years—the last three years, 1954 to 1956 inclusive, which only covers corn, there was shipped from that line 1,327 cars, total of three years, and 1,915 cars in the first six months of 1957.

Now referring to page 4, wherein we take a look at where the cars went in the years 1954, 1955, and 1956, and the first six months of 1957. I would like first to refer to Kankakee, and I will then come back to the Chicago showing. In the first column, in 1954 no cars from Blair to Kankakee, 1955, eight cars to Kankakee; 1956, eight cars; and the first six months of 1957, 121 cars. Dwight, I [fol. 802] would like to call particular attention to Dwight, from 2 cars to 101; Lostant, from 6 to 60; Milla, from 5 to 105; Union Hill, the highest year was 38 cars in 1956, to 150, making a total into Kankakee of 809 cars in the first six months of 1957, wherein only 24 cars moved in 1954, 91 cars in 1955, and 79 cars in 1956.

The same picture, to a degree, is self evident in so far as the cars that went to Indianapolis, and I will only refer to one, and that is Union Hill, which had no cars in 1954, none in 1955, 14 in 1956, and 115 in six months of 1957, and a total of their receipts were 263 cars.

The third is Paris, Illinois, and the exhibit speaks for itself.

Now, here are three processors, corn millers, that testified in these proceedings, and it is apparent why they want this rate to continue. The three of them received 64.1 per cent of the total number of cars that originated on this line in the first six months of 1957.

After the Paris showing there was miscellaneous. I took all other cars, the destination of other cars, and threw it into one category. I might mention that the town of Danville is included in that miscellaneous figure, which had 99 cars, which if added to the other corn millers would bring the total by the corn milling interests off of this [fol. 803] line up to 70 per cent at the bottom, the total picture is evident and speaks for itself.

The next exhibit—excuse me. I stated that I would come back to Chicago. I don't mean to miss that. It will be noted in the total column that in 1954 we at Chicago received 220 cars; in 1955, 330 cars; 1956, 368 cars; and in 1957, 548 cars, which would lead one to conclude that Chicago hasn't done so bad, either. We may not have done as well as Kankakee from a high of 91 cars to 809 cars, but we

don't see a falling off of business into the Chicago market. But to gain a true insight of the picture, it takes an analysis of those 548 cars to see what type and character they were. I would like to remind you at this point, the processors at Kankakee, Indianapolis, and Paris predominantly utilize free corn, as stated on this record. Now, of the cars that came into Chicago, let us examine the extent to which those were free corn.

The next exhibit, 49, is a six-page exhibit headed "Statement of corn receipts at the Chicago market originating on the Kankakee branch of the New York Central Railroad, November 1, 1954 to October 31, 1957."

(Protestant's Exhibit No. 49, Witness Chartrand, was marked for identification.)

The Witness: We were very curious to see to what [fol. 804] extent free corn was arriving at this market.

Page 1 thereof shows that we have taken by months this line of railroad, station by station, to ascertain the monthly figure or monthly total of free corn and the monthly total of CCC corn. You will note that we have split the month of December into two parts, December 1 to 14 and also December 15 to 30, to which I will later refer.

The exhibit speaks for itself, and I refer now to a recapitulation on page 5, which shows that for the first six months of 1955 the Chicago market received 45 cars of free corn from that line of railroad. In the first six months of 1956, 130 cars. The first six months of 1957, 31 cars. Taking the ten-month period, 98 cars in 1955, 272 cars in 1956, and 45 cars in 1957.

Page 6 thereof is a summary showing the annual totals, the year beginning November 1, 1955 and ending October 30, 1956, which would in fact be the sum of the first three columns, we received 276 cars of free corn. In the corresponding period, one year later, we received 52 cars of free corn. Breaking the day—starting with the day that this rate became effective, December 15, 1956, the prior year shows 273 cars as compared to 46 cars during the effectiveness of this rate.

The next exhibit, Number 50, is marked "Map B," which [fol. 805] shows in particularity the area we are most concerned with here and sets out the trucking distance from shipping points on the line of the New York Central to the river loading port.

(Protestant's Exhibit No. 50, Witness Chartrand, was marked for identification.)

The Witness: Now, in ascertaining this mileage we found the New York Central shipping points and related it to the river loading point most prominently used by them. We did not arbitrarily pick Morris, Illinois from Sunbury. That is the way the traffic had moved, and we show our mileages accordingly.

Next Exhibit, 51, is the contract carriers' tariff on file with the Illinois Commerce Commission and states therein rates for hauling corn and the other grains, both from the farm to an elevator or from an elevator to an elevator.

(Protestant's Exhibit No. 51, Witness Chartrand, was marked for identification.)

The Witness: In checking into this situation we gathered a considerable number of trucking prices from elevators in this territory to the river and found out that by and large the truckers adhere to the scale set forth in this tariff. I have been watching it carefully, and you, too, [fol. 806] can check from the record to find the consistency between the charges here and those that are generally charged in the country.

Now, I will agree there are instances where a trucker will take a distress load for something other than an established charge, but by and large we found that the actual experience followed this tariff, and in determining rates for the future we felt that this stable publication was one that we should look to.

Page 1 therein is an excerpt from page 3 of the tariff. Page 2 of this exhibit is an excerpt from page 16 of the tariff. All of the intervening pages are lists of participating carriers, solid pages just like these. There are better than 800 contract carriers that are parties to this tariff and on which their charges are based.

The excerpt from page 3, you see the second line, Raymond Acuff, from Ottawa, Illinois. Farther down the page, Anderson Brothers at Seneca. Another one, Buy Applebee, at Ottawa. Later, J. Barker at Essex.

Next page, Weber Brothers at Lockport, and Robert Wright at Marseilles, names that are familiar to us here.

Now, there are also other truckers located at other towns that we have not spoken of here, but would be free to do trucking business in this area.

Mr. Erickson: As clarification, you wouldn't wish to intimate that this is the only truck tariff on file with the [fol. 807] Illinois Commerce Commission. There may be others.

The Witness: Yes, that is right.

Page 3 of the exhibit is an excerpt from page 27 of the tariff which shows in item 610 the rate from the sheller to the market; item 620, the rate from elevator to elevator or elevator to terminal.

Now, the question was asked this morning about, well, if it is 18 miles from Dwight to the river and it is only 10 miles from the farm to the river, wouldn't it be less from the farm to the river. Now, let us look at that here. In item 610, 10 miles, under the first column, headed "shelled corn," 3¼ cents a bushel. In item 620, for 18 miles, the trucking, from elevator to elevator, is 3 cents a bushel. As was intimated, the length of time necessary to load at the farm or the sheller has been taken into consideration here, and we find generally the rates from the farm to the elevator on somewhat a higher basis than from an elevator to an elevator where the trucker can just put his truck under a spout and let the grain gravitate in there.

I would like to call your attention to the five-mile bracket, wherein from the farm to the elevator, 3 cents a bushel; from elevator to elevator, 2 cents a bushel. Fifteen miles, from farm to the elevator, 3¾ cents a bushel; whereas [fol. 808] from elevator to elevator for 15 miles, 2½ cents a bushel. There is a cent and a quarter a bushel more for hauling it from the farm to an elevator than from

one elevator to another elevator for exactly the same distance.

Now, Item 630 at the bottom of the tariff raised a question in our mind as to its conflict with item 620, and upon contacting the publishing agent we have found that item 630 should be canceled, and our next exhibit, 52, is an excerpt from Supplement 10 of this same tariff wherein item 630 has been canceled, leaving item 620 to cover the trucking charges from elevator to elevator.

(Protestant's Exhibit No. 52, Witness Chartrand, was marked for identification.)

The Witness: The next exhibit, 53, is a conversion table on corn which we may wish to make reference to before we get through, converting cents to bushels and bushels to cents on corn.

(Protestant's Exhibit No. 53, Witness Chartrand, was marked for identification.)

The Witness: The next exhibit, 54, is a 12-page exhibit headed "Statement of barge loading prices and New York Central track loading prices from January 1, 1957 through August 31, 1957."

[fol. 809] (Protestant's Exhibit No. 54, Witness Chartrand, was marked for identification.)

The Witness: We know, and has been stated amply upon this record, that the effect of rates find their way directly upon the country price in this territory. We could not approach this from a cost standpoint because we didn't know what all the incidental costs through elevators and trimming charges were concerned, but we felt this, that the price at the river quoted by the river houses included all costs. Likewise, the track price—

Mr. Murphy: I am going to object to his testifying about what the price at the river included. I don't think that he is qualified to testify as to what that price included.

The Witness: Mr. Examiner—

Mr. Murphy: I have an objection pending.

The Witness: I would like to answer that objection as counsel.

Mr. Murphy: You have a counsel.

The Witness: He is not my counsel.

Mr. Erickson: I am not counsel.

Exam. Dahan: We will be off the record.

(Discussion off the record.)

Exam. Dahan: Come to order.

The Witness: Mr. Examiner, in face of that objection [fol. 810] I would like to withdraw that statement and proceed therefrom.

In stating our position in this matter we felt that the New York Central rates were too low and, in searching for a solution thereto, as to what would be an equitable basis, we looked to the prices at the river and the New York Central track prices for our starting point.

Now we felt, as a preliminary statement to our process here, that the 5½ cent rate was too low, and we felt than an 18 cent rate was too high. We knew for sure that the existing rail rates were not competitive rates. It has here been suggested that 18 cents, based on cost, would be the kind of a rate, about which we have serious doubts, about being too high, so we proceeded from a price standpoint, since as has been stated here that the return to the country elevator or return to the producer is the thing that causes the traffic to flow either to the river or to the railroad. Our limitation with regard to knowledge of cost was another factor that caused us to look at this practical approach.

On page 1 thereof we obtained the Illinois River barge loading prices for the month of January at Spring Valley, LaSalle, Ottawa, Seneca, Morris, and we have shown in the last column the average price.

We proceeded throughout the month of January and [fol. 811] have shown at the bottom the average price for that month, which in the last column shows $1.2843 as the average Illinois River barge loading price for that month.

We proceeded in the same manner through the first seven months of 1957 as shown on pages 1 through 5 inclusive. Then on page 6 we obtained the New York Central track prices at Lostant, Milla, Streator, Missal, and Reddick,

and the New York Central price range. In the previous pages we find greater consistency or less range between the river prices because of the knowledge that they can obtain quickly with regard to their competitor's pricing situation, whereas on the New York Central these figures speak for themselves; apparently they are not as quick to know all the way along the line to the extent—what their competitors are doing, but these are the prices taken for the month of January which are averaged out and show in the last column an average price of $1.3055 cents per bushel, and we continued to take those prices through the first seven months of 1957 on the New York Central.

Page 10 thereof is a statement of those monthly averages, and I would like to refer to January, in order that it would be clear, and at the top of the headings we have Lostant, Milla, Streator, Missal, and Reddick, and accord- [fol. 812] ingly, on the first line we give the New York Central price taken from the previous pages, at Lostant $1.3058.

In the second part of the heading we see the river barge loading points, Spring Valley, LaSalle, Ottawa, Seneca, and Morris, with the average river price, and on the second line in January the word "river" indicating the river price of $1.2842.

Now, comparing in January Lostant versus Spring Valley, an average for the entire month, the New York Central was over the river to the extent of 2.16 cents a bushel basically, without regard to trucking, and at the other stations accordingly. The balance of the page shows the monthly averages, comparative analysis between the river and the New York Central for the seven months, and at the bottom of the page the seven-month average.

We were searching for some equitable—something constructive to offer here to show the situation wherein the New York Central and the river might be in as equitable a position as possible, all things considered. So at the bottom of the page we have averaged the seven-month comparison. We see the differences hovering around 2 cents a bushel, Lostant and Spring Valley, 2.07, Milla and LaSalle, 1.99, and in the last column, 2.02 cents a bushel that the New York Central was at an average along the entire rail-

[fol. 813] road—excuse me, along the entire line here involved, and the river loading points from Spring Valley to Morris on an average. The extent of the range between the highest point, the maximum range, that the New York Central was over the river as compared to the minimum side of the range, the maximum was 2.40 cents a bushel, and the minimum was 1.64 cents a bushel, or a range of .76 or three-quarters of a cent a bushel that the New York Central was over the river within that range at all times.

On page 11 we proceed to readjust the New York Central price taking into consideration this 2 cents that they are basically over to begin with and the trucking that might be involved from their various shipping stations to the river loading point.

For example, in the heading of the first column we say "trucking, a bushel, 2 cents." In the second column, 2½ cents; the third column, 3 cents; fourth column, 3½ cents; fifth column, 4 cents. In other words, if we applied the trucking tariff referred to before to the mileages referred to on Exhibit 50, we find that as we proceed eastward the New York Central shipping station is farther away from the river, and there is more trucking involved. So the extent of that trucking, which we firmly believe should be con-
[fol. 814] sidered, in addition to the extent that the New York Central was over the river basically and without consideration of trucking, those two factors are what we take into consideration in readjusting the New York Central price.

Now let us start in the column that says 2 cents trucking, and I would like you to have Exhibit 53, the conversion table, before you, so we can see how this converts from cents to bushels and from bushels to cents.

Considering first that the New York Central price was 2 cents over basically, and then adding thereto 2 cents trucking from nearby points, that is 4 cents a bushel, and if we look in our conversion table, we find that 4 cents a bushel is equal to 7.14 cents a hundred. In our opinion that is the extent to which the New York Central rate is too low at that 2 cent trucking point, lower than necessary to meet the competition. We have resolved that 7.14 cents adjustment into an even 7 cents. That is the reason, at the top of

column 1, we have 7 cents, which reflects 2 cent trucking to the river and 2 cent basic adjustment in the price.

Now, what is the effect of that? If we relate that to the existing prices in January, on the New York Central there was $1.3055 price. That was the average New York Central price, we readjust that rate 7 cents a hundred which, [fol. 815] on the conversion table, is 3.92 cents a bushel, and when we raise the New York Central rate, we correspondingly bring the country price down. Therefore, we reduce the price that the New York Central would be able to pay, reduce it from 130.55 to 126.63.

Now, at that same time and at that same station we look and see what the river price is, 128.43, but there is 2 cents trucking from that New York Central station to the river, which brings that river price at the New York Central country elevator, where 2 cents trucking is involved, down to 126.43. Therefore, we have narrowed that as closely as we possibly can, and under that readjustment the New York Central price would still be .2 of a cent a bushel over the river.

Now, I might say by further explanation that in approaching this problem we felt this, the New York Central Railroad was here seeking to place shipping points, elevators, on their railroad in a competitive position with the barge-rail competition, and we start from the New York Central shipping point on which our procedure here is based and disregarding the trucking from the country, the location of the farmer's farm. I have never been in a rate proceeding, nor have I heard of one, where, in establishing railroad rates, they took the location of the farmer's farm. [fol. 816] Sometimes he is between the competitive point, sometimes he is on one side, sometimes he is on the other, but we could not—and his natural advantage or geographical advantage or disadvantage, in our opinion, has no place in this picture. So therefore we approach it from a railroad, like the New York Central seeking to place their shippers on their railroad in a competitive position, upon which this adjustment is based.

Now, Exhibit 52 showed mileages from Morontz to Spring Valley of 4 to 10 miles—excuse me, 4 miles, Granville was 4 miles. That is the low end of the trucking and

would be the 2 cent column that we here talk about. On the east end we look at Union Hill, and there is 28 miles, and according to the truck scale that would approximate 4 cents a bushel which I believe has here been testified to. So therefore we have taken, broken the line up, putting it in categories as to its proximity or distance from the river and have taken that trucking cost into consideration plus the extent to which the New York Central was basically over at their shipping point.

I would like to give an example of the significance of that basic 2 cent difference. Suppose, for example, that Morontz, or this line of the New York Central, ran into Spring Valley. I use this as an example. And this same condition exists. The New York Central would have at Spring Valley [fol. 817] 2 cents a hundred higher than the river house because it is a price difference without consideration of trucking.

Mr. Murphy: I object to that statement and ask that it be stricken because the New York Central does not run into Spring Valley.

The Witness: All right.

Therefore, on page 11 we proceed from January, and on page 12, through the seven months, and in following the readjustment from the 2 cent trucking area, 2½ cent, 3, 3½ cent, 4 cent, on the basis of a seven-month average. What would result from an upward revision in the rates to the extent indicated, namely, from 7 cents in the 2 cent zone upward, the 10½ cents in the 4 cent trucking zone, how would the river and the New York Central stand on that seven-month average.

The bottom of page 12 indicates that from the 2 cent zone the New York Central would be .1 of a cent a bushel over the river, taking into consideration trucking and the basic price difference; from the 2½ zone would be .04 of a cent a bushel over; from the 3 cent zone would be .2 of a cent a bushel under; from the 3½ cent zone, .08 of a cent under; and from the 4 cent zone, .14 of a cent over.

[fol. 818] Now, translating that into what actually would happen, I would like now to refer to the next exhibit, Number 55, where we show that on a map, reading "Map show-

ing trucking from New York Central origins to the river; also suggested rate level to meet competition."

(Protestant's Exhibit No. 55, Witness Chartrand, was marked for identification.)

The Witness: Beginning at the west end, that 2-T means 2 cents trucking to Spring Valley, and if the rate were increased 7 cents a hundred from that zone, as referred to on page 12 of the previous exhibit, 7 cents increase plus the existing 5½ would raise the New York Central rate at Granville and Morontz to 12½ cents.

From McNabb through Streator, all falling within the 2½ cent trucking zone, the rate would be increased 8 cents a hundred or to 13½ cents. From that area, Missal through Dwight, the 3 cent trucking zone, the rate would be increased 9 cents per hundred to a total of 14½. Blair would be in the 3½ cent trucking zone, which would make its rate 15½, and Union Hill, in the 4 cent trucking zone, which would result in a 16 cent rate. As has been stated on this record, and we knew before, that the farther you get away from the river, the less intense the competitive situation is, and therefore, the extent to which there might not need [fol. 819] to be such a drastic reduction as there might be in close proximity to the river.

The next exhibit, 56, is a statement of simple and weighted average distance of the Kankakee Belt Line branch of New York Central, very much the same as already in the record, and the effect of our showing here is very little different, but it does point out that on a simple average distance and on a weighted average distance the breaking point is all within the 3 cent trucking zone or the 14½ cent readjusted rate.

(Protestant's Exhibit No. 56, Witness Chartrand, was marked for identification.)

The Witness: The next exhibit, 57, is a route map showing the McGraham formula to the east, and in the upper lefthand corner are the existing grain rates brought down to date, and the grain products rates would be ½ cent higher than that shown in the chart.

(Protestant's Exhibit No. 57, Witness Chartrand, was marked for identification.)

The Witness: The next exhibit, 58, is Map C, wherein we set forth that part of Illinois north of which the rates to the east are based on the Chicago combination. We show it this way; from that large central group the rate to Chicago is 25, the grain rate to New York is 53½, and the through rate is 78½.

[fol. 820] (Protestant's Exhibit No. 58, Witness Chartrand, was marked for identification.)

The Witness: The gathering rate, the proportional rate, and the total is shown in the various groups indicated.

Likewise grain products rates to New York would be ½ cent higher since the proportional rate from Chicago to the east is 54 cents instead of 53½.

Exhibit 59 is a statement of routes in connection with the Kankakee proportional rate on grain products to western termini points and to trunk line destinations, also the direct rates versus rates via Chicago.

(Protestant's Exhibit No. 59, Witness Chartrand, was marked for identification.)

The Witness: Page 1. What we have done here is taken the rates and routes to a western termini point, Buffalo. Then immediately thereunder we have taken the rates and routes to a point just east thereof in the trunkline territory of which Rochester is typical.

Looking at the first grouping of routes we find all of the routes in connection with the NYC-W are direct routes, none of which apply through Chicago. In the first rate column it is indicated that 47½ cents would be the rate to Buffalo, namely—that is on these corn products—5½ to Kankakee and 42 to Buffalo, 47½; whereas, if you [fol. 821] routed to Chicago, New York Central to Buffalo, you would pay the 25 cent rate to Chicago plus 42 cents beyond.

Now, the second bracket shows what we have to do to compete with the direct rate. The second bracket shows routes in connection with the IC Railroad. The IC has a direct route through Indianapolis and the B&O, and then

there are a number of routes via Chicago and connecting lines of which the New York Central-M is one. Therefore, if we buy grain on this line and we go to Buffalo, we must route it New York Central to Kankakee, IC to Chicago, and then New York Central in order to get the 47½ cent rate.

Now, suppose one of our people at Chicago processes this and sells it to a feed manufacturer in Buffalo. In order to get there for the 47½ cent rate it must have moved New York Central, Kankakee, IC, Chicago, and let's say the New York Central.

Now, the man at Buffalo puts it into feed, and he wants to go to Rochester.

We find there in the first bracket of New York Central routes you have a number of routes, NYC-W direct, or you have NYC-W Chicago, thence connecting line. In other words, if you are going to Rochester, you can route this New York Central Chicago, New York Central. But if you [fol. 822] are only going to Buffalo, you must come in here IC. You have adverse routing into Buffalo that you cannot possibly fulfill going through Rochester.

Mr. Murphy: May I ask a question for clarification? What you are saying is the fact that we have restricted routing to CFA, but unrestricted routing to trunkline and termini, is it?

The Witness: What I am saying is that this is a trouble you are getting into when you no longer break rates over Chicago but you take another place downstate and you start breaking rates over it, against the entire historical pattern.

In the second bracket of the Rochester showing it will show that there are no proportional rates from Kankakee to the trunkline territory in connection with the IC. Therefore, if you routed it into Chicago IC in the first place, you cannot utilize that tonnage going to the trunkline territory.

Now, the second showing on this page is Pittsburgh versus Altoona, which is the same situation and shows the routes to a termini point and to a trunkline point.

The next exhibit, Number 60, is a statement showing the mileage of—I might say it is headed "Statement of New York Central mileages direct and when via Chicago

and Indianapolis from Streator with percentage of circuity [fol. 823] involved. We used Streator as a representative origin on this line.

(Protestant's Exhibit No. 60, Witness Chartrand, was marked for identification.)

The Witness: The next exhibit, 61, is a five-page exhibit entitled "History of rates on grain and grain products to the east reflecting Chicago combination; also relationship between grain and grain products rates between—1907 to 1958."

(Protestant's Exhibit No. 61, Witness Chartrand, was marked for identification.)

The Witness: Page 1 thereof, and I will only refer to the New York column, on the last line gives us the rates in effect July 10, 1956. It will be noted that the proportional rate from Chicago to New York on grain was 49, and on grain products, 49½. There was a half a cent spread that the grain products rates were over grain at that time. That is true back to March 20, 1918 where, if you will see, the proportional rate to New York was 19½ on grain, and on grain products, 20. Grain products have been a half a cent over grain during that entire time.

Now, going back to 1907, it did not hew strictly to the half cent spread between them, but there was a cent or less spread between grain and grain products even back [fol. 824] to that time.

Page 2 is a statement showing grain rates, including whole corn, from this line of railroad, and we take the entire line, showing in columns 2 and 3, from Zearing to Depue, that is the first station west of Morontz, and from Morontz to Streator and from Missal to Union Hill and West Kankakee to Kankakee.

Starting under the present level of rates, Ex 206A back to the rates that existed on December 31, 1919, in every instance the rate to New York on domestic traffic was the Chicago combination from the entire line.

The excerpt shown below is really an excerpt from a Commission decision showing the establishment of the Chicago combination back as far as 1907.

On page 3 is the same information, only at ½ cent higher level because historically, clear back to 1919, the rates on grain products were ½ cent higher than grain.

Now, the excerpt under that—

Mr. Murphy: I am going to object to the introduction into the record as evidence of these excerpts.

Exam. Dahan: I am going to let them stay in here. Objection is overruled.

The Witness: Page 5 shows the same chronology of [fol. 825] rates, only on products of corn from this entire line to New York. We find the columns Zearing to Depue exactly as the previously exhibit, which are based on the Chicago combination, because they were not treated by the New York Central in this reduction. Then in the columns Morontz to Streator and Missal to Union Hill we see Kankakee combinations under Ex 206A of 59½ cents from Morontz to Streator and also 59½ cents Missal to Union Hill, whereas from Kankakee the rate still remains 72 cents, which is the Chicago combination.

The first three lines take us back to the time that the 5 cent rate became established, and prior to that time the rates will all be the Chicago combination, exactly the same as shown in the previous exhibit which applies on grain products other than these corn products.

The next exhibit, 62, is a statement of rates on whole corn and products of corn from origins on the Kankakee Belt Line of the New York Central to New York.

(Protestant's Exhibit No. 62, Witness Chartrand, was marked for identification.).

The Witness: It considers the entire line, taking first from Zearing to Depue, not here involved—or Zearing to Depue, not considered by the New York Central—then from Morontz through Union Hill and West Kankakee.

The exhibit will show that on whole corn, to which this [fol. 826] page 1 goes or is directed, is based on the Chicago combination.

Page 3 is a statement showing the same station, and the rate picture under products of corn here involved.

I would like to make one reference to a competitive rate that is in effect, and I refer to Ladd on page 3. In the

second to last column you see a 14 cent rate to Chicago, an interstate rate to Chicago, on the North Western, which is a published rate and in effect today which when used to the east is subject to the flat rate from Chicago as a minimum, which requires that 18 cent pad shown in the last column.

In other words, here is the North Western that reduced rates into Chicago, but the effect of the reduction has been nullified by the fact that the Chicago flat rate governs. Now, that is the very thing that the New York Central is confronted with here. They want to reduce a rate. While it is far too low in our opinion, the extent to which it might ever fall below 18 cents, they would need relief from the flat rate in order to make it useful. There are only two that I have shown here that are rates that are in effect today, and that is at Ladd and Depue, 14 cents. I might state further, going to Ladd it will be seen that on the CB&Q, in the last column, there is a 20 cent rate which is a com- [fol. 827] petitive factor to New York. That 20 cents is above the 18 cent minimum pad or the Chicago flat rate; therefore, you can take 20 cents to Chicago, plus 54 to New York on grain products and establish a total of 74 cents, whereas from Ladd the New York Central have not even met that competition but still have a 79 cent rate.

Page 5 is self explanatory. It shows the rates in effect December 14, 1956 and December 15, 1956 brought up to the current Ex 206A level.

There we can see the rates accorded whole grain, other than corn, whole corn, grain products other than corn products, and the corn products before and after this 5 cent rate went in effect.

Page 6 thereof is a statement comparing the corn and the corn products rates from Morontz as a typical western station to Buffalo and points east thereof on whole corn, corn products, and grain products other than corn. Now, let us take whole corn to Buffalo from Morontz. 66½ cents on whole corn. The Chicago market sells corn to that gentleman on the basis of 66½ cents from Morontz. If he manufactures that into feed or he mills it within the tariff provisions and goes to Rochester, the through rate to Rochester is 52½ cents, and there is a three-way rule provision under

[fol. 828] transit whereby the rate from origin to Buffalo, if higher, will apply as a minimum. That transit operator has overpaid into his transit station at Buffalo to the tune of 14 cents a hundred, whereas, if it were processed at Kankakee and went to Rochester, no such 14 cent penalty would arise.

There are two other examples on the page which follow the same example. I might say, before leaving that, corn into Buffalo was 66½. Looking in the last column—excuse me—½ corn and oats, for example, into Buffalo would be 66½. Now, if it were processed at Buffalo into oat products and went to Rochester, the rate would be 72 cents, as it was, has always been, differentially over Buffalo, and the three-way rule would not come into operation.

Page 7 is a statement of grain rates from western origins to New York. We begin at Ashtabula, Ohio, and we work westward. It is a statement of the grain products rates with 47½ at Ashtabula, upward, until we get to Porter, Indiana, where it is 69½ to New York domestic; we get from Dwight to Streator, the rate is dropped to 59½, and then we go out to Ladd and Zearing, untreated here, to 79. The last column shows the picture on other grain products.

The next exhibit, 63, is a statement of prices taken [fol. 829] from the Wall Street Journal and from mill feed brokers or feed stuff brokers here in Chicago as of January 27, 1958, which shows the value of some of the products here enumerated, gluten feed, $41 a ton; gluten meal, $74 a ton; mash-spent grain, dried, $52 a ton; brewer's grain, $52.50 a ton, as compared to the value of whole corn reduced to a ton basis of $40 per ton.

(Protestant's Exhibit No. 63, Witness Chartrand, was marked for identification.)

The Witness: The last exhibit, 64, is a graph which portrays—the source of which was from the waybill analysis termination studies, 1948 to 1956 inclusive, and covers numerous grains as is clear thereon.

(Protestant's Exhibit No. 64, Witness Chartrand, was marked for identification.)

The Witness: We point particularly to the average revenue for short line car mile taken from the waybill analysis termination studies published by the Commission on corn from the period 1948 to 1956. The lowest earning per ton mile was 73 cents and the highest was 95 cents, whereas Witness Graves, in his Exhibit 28 on page 7 thereof, showed an average car mile earning of 50.69 cents per car mile.

Mr. Murphy: Are you referring to Witness Herron rather than Witness Graves?

[fol. 830] The Witness: It might have been Herron, that is right. That is right. It was a comparative analysis of the car mile earning on corn here involved and on other commodities.

That completes my presentation.

Cross examination.

By Mr. Freeman:

Q. Your prices are on number 2 yellow corn?

A. Oh, yes, basic number 2 yellow corn.

Mr. Freeman: That is all.

Exam. Dahan: Mr. Murphy?

Mr. Murphy: I was going to suggest the noon hour recess.

Exam. Dahan: Is your cross examination going to be lengthy?

Mr. Murphy: Frankly, I don't know.

Exam. Dahan: Let us recess for one hour.

(Whereupon, at 1:15 p.m., a recess was taken until 2:15 p.m. of the same day.)

[fol. 831] Afternoon Session 2:15 p.m.

Exam. Dahan: Come to order. Do you have some further direct testimony you would like to present?

J. S. Chartrand resumed his testimony as follows:

Direct examination (continued)

The Witness: I would like to ask leave to make one statement that I am afraid I did not make clear and summarizes my conclusions with regard to the evidence here submitted, and I would like to refer to Exhibit 55, which was the map which showed the rates proposed.

I did make reference to the fact that the simple average and weighted average distance fell within the 3 cent trucking zone, but failed to state that in our opinion the rates along this entire line should be blanketed, like they have in the past, on the basis of that simple average or weighted average distance; in other words, that there should be along the entire line, from Morontz to Van's Siding, if that is the most easterly point, a single rate of 14½ cents. I consider the treatment along the river of the stations from Morris through Spring Valley as a unit because of the pricing situation; and secondly, the treating of the entire line as a unit already by the New York Central, in our opinion, that it should be blanketed, but at this higher rate of 14½ cents. [fol. 832] That concludes my statement.

Exam. Dahan: Mr. Murphy?

Mr. Murphy: Is there any additional direct questioning?

Cross examination.

By Mr. Murphy:

Q. Mr. Chartrand, in your Exhibit Number 44 you indicate that increase in the receipts of corn at Chicago market, on page 2, is that correct?

A. Of 1957 over 1956.

Q. That is correct. And that increase, as I understand it, was from 98 million bushels to 137 million bushels.

A. Total via all forms of transportation.

Q. That increase is in the nature of 40 per cent, is it not?

A. Yes, 40.3 per cent.

Q. Mr. Chartrand, are those increases in receipts in direct proportion to the increase in the production of corn 1957—1956 crop year over 1955 crop year?

A. No, I don't say that, but there have—

Q. Well, just—

A. No.

Q. Let me ask you this question then: is it a much greater increase than the increase in production?

A. I can't be sure. It does reflect the increase in receipts. [fol. 833] Q. You don't know anything about increased production then.

A. No, I do not.

Q. Mr. Chartrand, you indicate on this same exhibit the amount of the receipts via several modes of transportation. Do you know where this corn that was brought to Chicago by railroad originated, what general areas?

A. No. It is our total receipts.

Q. Do you know how much of that corn comes to Chicago by rail from the Illinois River area?

A. No, I do not.

Q. Do you have an opinion as to whether it would be a substantial portion of the 139 million bushels or 137 million bushels?

A. I only know this, that Illinois and northern Illinois is a heavy corn-producing section, and I would say that a substantial portion came from northern Illinois, and I wouldn't confine it to this particular area, but it would be part and parcel of northern Illinois picture.

Q. How many states does the Chicago Board of Trade draw from? I mean, would these receipts reflect?

A. I would say that the natural trade territory tributary to the Chicago market would probably extend eastward somewhere in Indiana, probably a north and south line [fol. 834] probably bisecting the state, would extend southward through half of Illinois and then probably west into Iowa, southern Minnesota and southern Wisconsin.

Q. You indicated in your testimony that x-barge corn at Chicago moves east by rail. Do you know what proportion of that would move east by rail?

A. No, I do not. I would say—I would have the opinion that it would be a large amount because that is the only direction that the barge tonnage is good for the proportional rate; therefore, the barge tonnage could not be used to the west or to the south or to the north.

Q. Well, directing your attention to your Exhibit Number 45, you show there that the rail shipments from the Chicago market for the year 1956 were 37 million bushels, in rough figures, and on your Exhibit Number 44 you show that the total receipts of corn at Chicago for that year were 98 million bushels. Is there a substantial movement of corn on the lake east?

A. Yes; yes.

Q. This corn, this x-barge corn could move east on the lake also, could it not?

A. Yes, if you want to throw the billing value away. That wouldn't be prudent.

Q. Well, now, you have rail arrivals at Chicago of 68 million that year. Do those rail arrivals have any billing [fol. 835] advantage?

A. Well, some of those rail arrivals, for example, might move into Chicago on an intrastate rate and have subsequent movement beyond Chicago by lake.

Q. Well, some of the rail arrivals—is rail billing not used the same as barge billing might not be used if it moved by barge—moved by lake vessel?

A. Well, I will say this: we almost get into a difficult problem with regard to the value of individual billing, whether it be by barge or by rail—

Q. I wasn't attempting to get into something complicated other than find out if it isn't a fact that x-barge corn does move east by vessel.

A. Well, that is true.

Q. Thank you.

A. Just a moment. It does move east—the corn could move east, but the billing could be retained and utilized by rail on other corn to the east.

Q. Then the x-barge billing is valuable billing.

A. Yes.

Q. Mr. Chartrand, on page 5 of your Exhibit Number 49 you indicate that the rail movement of free corn to Chicago from Kankakee Belt origins in 1956 was higher than in 1955 and higher than in 1957. Isn't it a fact that that was an unusual situation in 1956, sir?

[fol. 836] A. Not to my knowledge it wasn't. Free corn, a price will always move free corn, and that 272 cars in

the first ten months of 1956 moved freely into the Chicago market.

Q. Did you notice the disparity between the 1955 and 1956 figures when you were preparing this exhibit?

A. You mean an increase from 45 to 130? Yes.

Q. Do you have figures that would take you back to 1954, 1953, 1952, or 1951?

A. This was about as far as we could go on this because it required an examination of the arrival notices clear back to November 1954, which is tremendous number of cars into Chicago, and that is as far as we were physically able to run it.

Q. You are not able to say whether or not that was an unusual or usual situation.

A. I know of no circumstance that would categorize it as unusual.

Q. Do you know of any circumstance that would indicate to you that it was usual?

A. No. Those are the facts, sir.

Q. Mr. Chartrand, do you recognize that both the New York Central and the river are interested in competing for corn in that area between the New York Central and the river?

A. Yes.

[fol. 837] Q. Do you think that the New York Central should have an opportunity to compete—and I am not taking you at this time to specific levels of rates—in that area.

A. I believe I said that in our statement of position.

Q. You have constructed in your Exhibit 54 something that you call an adjustment of varying amounts which you suggest should be added to the rail rates in reaching the ultimate proposal of 14½ cents from the Kankakee Belt origins. You heard the testimony of the witnesses presented by certain of the protestants to the effect that they transported some of them as high as 98 per cent of the corn they handled direct from the farm to the river?

A. That's correct.

Q. Would you think that that was an actual transportation factor that should be reflected in any rate adjustment?

A. It never has in the past. My answer then is no.

Q. Well, you add trucking costs to the barge factor to arrive at what you call adjustment. Wouldn't it be appropriate then to add it on to the rail factor also?

A. The reason I consider it in connection with the barge price, again here is the New York Central seeking to place its shipping points or elevators on its railroads in a competitive position; I look at that man with that corn that [fol. 838] he has bought, and what would be the proper basis on which he should be able to ship by rail under an equal basis as compared to being forced to go to the river and then barge to Chicago, and I have taken from a pricing standpoint the difference between the two, and the trucking which you have failed to take into consideration, which I think should be considered. Now, that is not original with me.

Q. I think you have answered my question, Mr. Chartrand. Do you recognize that there is a factor of elevation in the rail cars when the traffic moves out by rail?

A. Yes.

Q. Would you think that factor should be considered?

A. Well, it isn't spelled out here, and I realize these are New York Central track prices. That is in the boxcar on the railroad, and to which there would be, let's say, 2 cents a bushel from the information that I have gathered direct from that territory for that elevatorman's commission for putting it in that car. However, I also found by direct contact with those people down there that there was a commission of about the same amount allowed to the inland elevator where he dealt with the producer and the corn moved forward via the river. Therefore, one commission which might have the semblance of a buying commission in behalf [fol. 839] of water car, but would offset the handling into the boxcar and the commission of the rail elevator.

Q. Would you appreciate the fact that there would be a cost of operation involved when it is handled through a rail elevator?

A. Oh, yes.

Q. But no cost if it isn't handled through that elevator?

A. That's right. I didn't go to costs. I went to commission charges that I found assessed on each operation.

Q. I would like to direct your attention to Exhibit Number 59, Mr. Chartrand. You have shown some routing situations there. I ask you, are there any routing changes involved in this proceeding?

A. The effect of what has been done—

Q. Just answer my question.

A. Involved in this proceeding?

Q. Yes.

A. Yes.

Q. Are there routine changes involved?

A. Yes.

Q. Are there any routes being added?

A. Added?

Q. Yes.

A. No.

[fol. 840] Q. Hasn't the reshipping rate from Kankakee applied to the same routes that it now applies?

A. Yes.

Q. There has been no change in the routing on the Kankakee reshipping rate.

A. No.

Q. There is involved here a reduction in rates from New York Central Kankakee stations on the west end to Kankakee from the rates that were previously in effect. Now, were the rates that were previously in effect local rates in so far as they—to Kankakee?

A. No, they were local rates to Chicago.

Q. And is the rate, 5½ cent proportional rate, is that also a local rate to Chicago?

A. No, sir.

Q. In the same sense that the other rates were local rates to Chicago?

A. No, sir. It is a proportional rate to Kankakee.

Q. There is no change in the routing in connection with the reshipping rate.

A. From Kankakee.

Q. That's correct.

A. That's right; that's right.

Q. I would like to have you direct your attention to Exhibit Number 61, Mr. Chartrand. I ask you if it isn't [fol. 841] a fact that there are higher rates than on corn

products to CFA destinations from the origin stations involved at the present time.

A. Some.

Q. There are some.

A. Yes.

Q. Directing your attention to Exhibit Number 64, Mr. Chartrand, you have some figures here based upon the 1 per cent waybill studies.

A. Correct.

Q. Do you know what the average distance for each of the commodities shown was in those studies?

A. I don't have them here. This is another national average for whatever the distance was shown.

Q. Let us assume that the average distance found on the 1 per cent study was less than the distance from the west end to New York. Would you expect then that the earnings for the shorter distance would be less than the earnings for a longer distance to New York under normal rate-making theories?

A. Oh, I think that this would come down for longer distances; the graph would come down for longer distances, but it would be well to take a look at them and see. This 50.69 is still awful low.

Q. I am just asking you about this now. Now, you indi- [fol. 842] cate on your exhibit that the earnings portrayed in your graph are via the short line distance.

A. Yes.

Q. Did you ever find an actual route of movement to be as short as the short line distance—I shouldn't ask that, you may have found an exception—

A. I have.

Q. Isn't it generally true that the actual route of movements will exceed the short line distance?

A. Yes, and some of the short tariff routes are very close to the absolute short line distance.

Q. But to the extent that the actual route of movement was shorter—was longer than the short line distance, then you would expect that this reflected actual movements, it would be a lower car mile earnings than you show. That is true. I suggest you check the absolute short line distance from Kankakee to Albany, New York and the New York

Central mileage. I don't think you will find them very much different.

Q. You used this as a criticism of Mr. Herron's exhibit.

A. You are asking me about actual mileage versus absolute short line, and I say in many instances they are very close and sometimes the same, so you would have to consider each on the individual basis.

Q. In no instance would the distance via the actual route [fol. 843] of movement be greater than the earnings via the short line distance.

A. That is true.

Q. And it would be a rare instance where you would find the short line distance and the actual route of movement to be the same. Is that true?

A. I will—

Q. For distances of 700 miles.

A. I will go along with you on this and say, by and large actual tariff routes are greater to some extent than the absolute short line distance.

Q. In comparison of short line distance earnings with actual route of movement earnings, it is not comparing like with like, is it, sir?

A. No, I don't think the 5½ cents and the barge is like with like, either.

Q. Now, Mr. Chartrand, I know your opinion on that. All I want is a simple, fair answer to my question.

A. I think allowances have to be made, yes.

Mr. Murphy: That is all we have of this witness.

Exam. Dahan: Do you have any redirect?

The Witness: No, sir. That completes our case.

Exam. Dahan: Any objection to the receipt in evidence of Exhibits 42 through 64?

(No response.)

[fol. 844] OFFERS IN EVIDENCE

Exam. Dahan: Exhibits 42 through 64 will be received in evidence.

(Protestant's Exhibits Nos. 24 through 64, Witness Chartrand, were received in evidence.)

Exam. Dahan: That completes protestants' case.

Do the respondents have any rebuttal testimony to present?

Mr. Murphy: One witness.

Exam. Dahan: Very well, sir.

L. W. SCHALLER previously sworn, testified further as follows:

Direct examination.

By Mr. Murphy:

Q. Will you state your name, please.

A. L. W. Schaller.

Q. Are you the Mr. Schaller who testified earlier in this proceeding?

A. I am.

Q. And you testified on behalf of whom at that time, sir?

A. Indianapolis Board of Trade and Evans Milling Company at Indianapolis.

Q. Have you had an opportunity to review Exhibit 39 presented here by Witness McClintock?

A. I did.

Q. Have you any comments to make in regard to that [fol. 845] exhibit, sir?

A. In so far as Indianapolis is concerned, I do not think that it reflects a true picture. This exhibit sets forth a fact or endeavors to set forth a fact that the only charge you have on a shipment moving through Indianapolis would be your rail rate. Certainly you can't use the grain in the boxcar. It must be unloaded, it has to be inspected, it has to be elevated, the same as it does in Chicago. The grain moving to Indianapolis east moves to a processor at Indianapolis, who has to unload it, and in every case he has to elevate it.

Now, whether or not he pays some outside concern for that elevation or whether he does it himself, he still has an elevation charge, because your elevator and your mill is not connected physically other than by a conveyer.

If the corn moves into a terminal elevator, they have an elevation charge, both in and out, and in that respect I do not think that this exhibit sets forth a correct picture.

Q. When the corn moves through a terminal elevator at Indianapolis and it is elevated in and out, is that in addition to the elevations by the miller at his elevator?

A. That's right.

Mr. Murphy: That is all we have on direct of this wit-
[fol. 846] ness, your Honor.

Mr. Freeman: I just have one question.

Cross examination.

By Mr. Freeman:

Q. You are with the Evans Milling Company, are you not?

A. That's right.

Q. And you have bought corn off the Kankakee Belt—

A. Yes, sir.

Q. —for your processing plant.

A. That's right.

Q. Did any of that corn get an elevation at any other elevator than the elevator that you own?

A. Yes, sir.

Q. And what proportion was that?

A. I would say 25 per cent of it we bought out of a terminal elevator at Indianapolis. I do not have the exact number of cars.

Q. Did you buy that on the trading floor at Indianapolis?

A. We either bought it on the trading floor or we bought it on contract, one of the two. Part of it—that out of the terminal elevator wasn't bought on the trading floor. That was bought on contract.

Q. The balance of it, which would be 75 per cent, moved direct to your elevator, which is located next to your processing plant at Indianapolis.

[fol. 847] A. You mean without being unloaded first in the terminal elevator?

Q. Yes.

A. That's right.

Q. And that elevator is physically connected with your processing plant.

A. The elevator at Indianapolis, I would say, is 150 yards north of our corn bins, and the only physical connection is a conveyer belt from the elevator down to the working bins in the mill.

Q. That conveyer is the method by which you get the corn from your elevator to your processing plant.

A. Yes. That is after the corn has been elevated.

Q. Do you pay any more for corn which you get—comes directly to your elevator than you do from corn which you buy from another elevator at Indianapolis?

A. That all depends on the market, the price it is going.

Q. Would you buy it from another elevator at Indianapolis if you could get it cheaper some other way? The other way being direct to your elevator.

A. If we could get the same kind of corn, naturally you would buy it where you could get the best price, where you would buy the cheapest.

Mr. Freeman: That is all.

[fol. 848] Mr. Legg: I have a question.

By Mr. Legg:

Q. Did you not testify in your original testimony that you had bought corn for Evans Milling at Chicago?

A. Yes, we bought corn at Chicago.

Q. Do you know whether any of that corn ever was elevated at Chicago before you bought it?

A. Only an assumption.

Q. You don't know.

A. I assume that it come out of an elevator, and if it came out of an elevator, I presume it had an elevation.

Mr. Legg: I have no further questions.

Exam. Dahan: You are excused.

(Witness excused.)

Mr. Murphy: We have one more witness.

Exam. Dahan: All right.

Mr. Murphy: I am recalling Mr. Graves.

LAWRENCE E. GRAVES previously sworn, testified further as follows:

Direct examination.

By Mr. Murphy:

Q. Did you hear the testimony of Mr. Chartrand this morning?

A. I did.

Q. Did you have an opportunity to see his Exhibit Number 55?

[fol. 849] A. I did.

Q. And hear him suggest that an appropriate rate for blanketing across the west end would be 14½ cents to Kankakee?

A. Right.

Q. Mr. Graves, if the New York Central established a rate of 14½ cents from all of the stations on the west end of Kankakee, would you use that rate?

A. No, we wouldn't buy corn.

Q. Why not, sir?

A. Because it is too high.

Mr. Murphy: I have no further questions, your Honor.

Cross examination.

By Mr. Chartrand:

Q. Mr. Graves, how much too high is it?

A. Let's see, between—9 cents. That is how much too high it is.

Q. Well, I believe that you have been instructed to carry out the philosophy of General Foods with regard to pulling out of that territory if it results in taking business away from any other railroad?

A. I am aware of what Art Scheer stated, the same as you are, and the statements he made in connection with that, yes.

Q. But you wouldn't pull out of the market if it took it [fol. 850] away from the barge lines, would you?

A. No.

Mr. Chartrand: That is all. Thank you.
Exam. Dahan: You are excused.

(Witness excused.)

Mr. Murphy: Nothing further.
Exam. Dahan: Do the parties desire to file briefs?
Mr. Murphy: Yes. I suppose we should—
Exam. Dahan: It is understood the briefs filed will show the proposed findings of facts under which the parties rely.
Mr. Murphy: Yes, under the rules. May we also have a proposed report?
Exam. Dahan: I am going to ask you whether you would like a proposed report.
Mr. Freeman: I assume the New York Central does, and protestants do.
Exam. Dahan: I will show that the parties do desire it. Of course that is up to the Commission, whether they want the examiner to put a report out or not.
Mr. Freeman: May we have some agreement about a special date for briefs?
Exam. Dahan: Yes. Can you come to an agreement between you? I am willing to give you as long as you want. [fol. 851] Mr. Freeman: We are in a hurry on this, if your Honor please. What time can we expect the transcript.
May we go off the record?
Exam. Dahan: Yes.

(Discussion off the record.)

Exam. Dahan: On the record. The brief date will be April 15, 1958.
Mr. Freeman: May I inquire about a reply brief?
Exam. Dahan: There will be no reply briefs.
Mr. Freeman: You want no reply briefs?
Exam. Dahan: No.
Mr. Freeman: Mr. Murphy has just handed me a set of figures which were requested, showing movements on the Kankakee Belt to stations from Zearing, Illinois to South Bend which have been prepared—which come from

the files of the New York Central. May that be marked for identification?

Exam. Dahan: That may be marked for identification Exhibit Number 65 and will be received in evidence.

Mr. Murphy: With the understanding in the record that these figures do not separate corn from other grain, nor do they break down traffic from stations east of Kankakee and stations west of Kankakee on the Kankakee Belt.

Mr. Freeman: It so states, does it not?

[fol. 852] Mr. Murphy: Yes.

(Joint Exhibit No. 65 was marked for identification.)

OFFER IN EVIDENCE

Exam. Dahan: That will be received.

(Joint Exhibit No. 65 was received in evidence.)

Mr. Murphy: A further request was made by Mr. Freeman for the figures corn originated on the west and during the year 1957, figures January to August were 2411, during the month of September, 16 cars, during the month of November, 108 cars, during the month of December, 146 cars, for a total of 2681 cars on that branch of the railroad during the year 1957.

Exam. Dahan: The hearing is closed.

(Whereupon, at 3:00 p.m., the hearing was closed.)

[fol. 853]

BEFORE THE INTERSTATE COMMERCE COMMISSION

FSA No. 33955

In the Matter of:

CORN AND CORN PRODUCTS, ILLINOIS TO OFFICIAL TERRITORY

Transcript of Hearing—October 29, 1959

Hearing Room B,
Interstate Commerce Commission,
Washington, D. C.,
Thursday, October 29, 1959.

The above-entitled matter came on for oral argument before Division Two at 10 o'clock a.m.

* * * * *

APPEARANCES:

* * * * *

[fol. 853a] Wilbur S. Legg, Room 2500, 135 S. LaSalle Street, Chicago, Illinois, appearing for A. L. Mechling Barge Lines, Inc., Emington Grain Company, Bookwalter Grain Company, Cullom Cooperative Grain Company, Dale P. Walsh, Charles Treasure, Griswold Grain Company, Mazon Farmers Elevator, protestants.

[fol. 854] INDEX

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Oral Argument of:

* * * * *

Wilbur S. Legg (Protestants) 925

* * * * *

[fol. 925] ORAL ARGUMENT OF WILBUR S. LEGG

Mr. Legg: May it please the Commission:

I represent the A. L. Mechling Barge Line, who, according to these people, are the villain in this piece.

* * * * * * *

[fol. 932] which commands a premium off the rail and does not command a premium off the barge line.

The other item is the outbound inspection incurred by reason of the fact that we load whole corn out of the elevator at Chicago into the rail car to get it ready to move to a processor. This inspection charge is not incurred any further by the processor when the corn is used directly by the processor as it is at Kankakee, Danville or Indianapolis, because there is no inspection charge on the products that come out.

The total of these figures for the river movement was about 22½ cents. The total for the rail movement was about 10 cents, plus whatever it costs the farmer to get his grain to the rail elevator.

This does not take into account any of the normal disadvantages of barge shipment, that is, the large accumulation of inventories, the necessity to provide insurance that the shipper bears the cost of; it doesn't take account of delays on account of bad weather; it does appear, however, that taking into account the under-statements in the river costs that we did make for safety's sake, and the farmer's cost of getting his grain from the farm to the elevator, there must be a difference between the barge rate and the rail rate of from 10 cents to 10½ cents per hundredweight.

Commr. McPherson: Sorry to interrupt you there. [fol. 933] Are you saying then that the rail is the low-cost carrier?

Mr. Legg: No, sir, I am not. The barge line is clearly the low-cost carrier.

Commr. McPherson: In the transportation charges—

Mr. Legg: It is in the transportation charges, itself. We have a cost of operation of about 4.4 cents per hundredweight, whereas the rail fully-distributed costs are in the neighborhood of 14.4 cents per hundredweight.

Commr. McPherson: In these other charges—

Mr. Legg: These are shipper costs that they incur and that we think our inherent low-cost advantage should be preserved in order to provide for. Otherwise, we lose our market for our transportation services.

Commr. Hutchinson: Your operating cost figure that you just gave is—

Mr. Legg: 4.4 cents per hundredweight. There is a cost study in the record which is very clear on that.

Commr. Hutchinson: That is where the difficulty comes, is it, or not, that that cost, operating cost figure, doesn't cover as much service as the cost figure on the other side covers, is that it?

Mr. Legg: I would say it covers probably as much service, but there are a lot more services to handle barge corn than there are to handle rail corn.

Commr. McPherson: The question is, overall, who is the [fol. 934] low-cost carrier?

Mr. Legg: I think probably we still are, but then it would be a very close case, if you took that view. I think you should take the view, though, that if we can provide a low-cost service of transportation, then whatever services are incurred by the shipper beyond that, we have to take care of on a competitive basis. But they won't be incurred by the shipper if we cease to be low-cost by as much as we are now.

I might say that is a real danger, too, because if we lose a substantial volume of our business here, our unit costs are obviously going to rise, because this movement by Mechling is pretty much in specially-built barges that can't economically be used in other services.

The other point that the gentlemen on my right make is that this really hasn't hurt us. They have taken four and a half million bushels of corn per year away from us, and it doesn't make a bit of difference, we have had more corn than we ever had before. They derive that argument from a comparison of figures for the years 1956, basically, and 1957, the first eight months of each year.

In 1956, the five and a half-cent rate was not in effect. In 1957, it was.

Commr. Hutchinson: Excuse the interruption. So I might be clear:

* * * * * * *

[fol. 934a] Secretary's Certificate to foregoing transcript (omitted in printing).

[fol. 935]

SUPREME COURT OF THE UNITED STATES

Nos. 746 & 747—October Term, 1962

A. L. MECHLING BARGE LINES, INC., et al., Appellants,

vs.

UNITED STATES, et al.; and
BOARD OF TRADE OF THE CITY OF CHICAGO, Appellant,

vs.

UNITED STATES, et al.

Appeals from the United States District Court for the Northern District of Illinois.

ORDER NOTING PROBABLE JURISDICTION—June 17, 1963

The statements of jurisdiction in these cases having been submitted and considered by the Court, probable jurisdiction is noted. The cases are consolidated and a total of two hours is allowed for oral argument.

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JAN 15 1963
JOHN F. DAVIS, CLERK

No. 58

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

A. L. MECHLING BARGE LINES INC., a corporation, IRA BOOKWALTER, CULLOM COOPERATIVE GRAIN COMPANY, CHARLES TREASURE, GRISWOLD GRAIN COMPANY, and MAZON FARMERS ELEVATOR,

Plaintiffs-Appellants,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois

JURISDICTIONAL STATEMENT.

EDWARD B. HAYES
WILBUR S. LEGG
Attorneys for
Plaintiffs-Appellants

LORD, BISSELL & BROOK
135 South LaSalle Street
Chicago 3, Illinois
Telephone: 346-7475

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

No.

A. L. MECHLING BARGE LINES INC., a corporation, IRA BOOKWALTER, CULLOM COOPERATIVE GRAIN COMPANY, CHARLES TREASURE, GRISWOLD GRAIN COMPANY, and MAZON FARMERS ELEVATOR,

Plaintiffs-Appellants,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois

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JURISDICTIONAL STATEMENT.

This appeal is filed on behalf of A. L. Mechling Barge Lines Inc., Ira Bookwalter, Cullom Cooperative Grain Company, Charles Treasure, Griswold Grain Company, and Mazon Farmers Elevator. These appellants will sometimes be called plaintiffs herein and the Board of Trade of the City of Chicago which has also filed notice of appeal in this proceeding will sometimes be referred to herein as the intervening plaintiff.

OPINIONS BELOW.

The opinion of the three-judge United States District Court for the Northern District of Illinois, Eastern Division, in this proceeding is reported at 209 F. Supp. 744, and also is attached hereto as Appendix A. The final judgment of that Court is attached hereto as Appendix B. The report of the Interstate Commerce Commission (sometimes herein referred to as the "Commission") dated June 8, 1960, may be found at 310 I.C.C. 437, and is attached hereto as Appendix C. The Commission's Fourth Section Order No. 19346, entered in this proceeding is attached hereto as Appendix D. The proposed report of the Commission's examiner issued in this proceeding on March 16, 1959, is attached hereto as Appendix E.

JURISDICTION.

This action was brought under 28 U.S.C. §§ 1336, 1398, 2284 and 2321-25, inclusive, and 5 U.S.C. §1009, to enjoin and set aside an order of the Commission which relieved certain railroads (over the protests of numerous parties including the plaintiffs and intervening plaintiff) from the long-and-short haul prohibition of the Interstate Commerce Act. The judgment of the District Court dismissing the complaint was entered on September 18, 1962. Plaintiffs filed their Notice of Appeal on November 16, 1962.

The jurisdiction of this Court is confirmed by 28 U.S.C. §§1253 and 2101(b).

The following decisions sustain the jurisdiction of this Court to review the judgment on direct appeal in this case. *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567 (1947); *Dixie Carriers* v. *United States*, 351 U.S. 56 (1956); *A. L. Mechling Barge Lines Inc.* v. *United States*, 368 U.S. 325 (1962).

STATUTES INVOLVED.

The following statutes are involved:

The National Transportation Policy, 49 U.S.C., preceding Section 1; Sections 1(5), 3(1) and (4), 4(1), 12(1) and 13(1) of the Interstate Commerce Act, 49 U.S.C. Sections 1(5), 3(1) and (4), 4(1), 12(1) and 13(1); and Section 10 of the Administrative Procedure Act, 5 U.S.C., § 1009. The foregoing statutes are set forth in Appendix F attached hereto.

QUESTIONS PRESENTED.

Questions presented by this appeal are as follows:

1. In a proceeding under Section 4 of the Interstate Commerce Act, enforced and administered so as to give effect to the National Transportation Policy, was it error for the Commission to refuse to consider evidence that a separately published inbound factor of a two-factor rail rate was too low to cover the publishing railroads' out-of-pocket costs for such transportation services, when only the transportation covered by that non-compensatory inbound factor was subject to the competition claimed as a justification for the fourth section departure for which the Commission granted authorization, thereby requiring the non-competitive reshipping factor of the rate (applicable also to traffic brought to the reshipping point by the alleged water competition) to subsidize the competitive and non-compensatory inbound factor?

2. Is Section 4 of the Interstate Commerce Act applied in accordance with the mandate of the National Transportation Policy when a reduced rail rate departing from the 4th Section is authorized, even though the rate will divert traffic from water carriers, yet still not increase

the net revenue of the railroads proposing such departure, but on the contrary will decrease it?

3. In considering whether a combination two-factor rail rate on corn (to be milled in transit) was compensatory within the meaning of Section 4 of the Interstate Commerce Act, enforced and administered to carry out the National Transportation Policy, was the Interstate Commerce Commission in error in considering the revenue from both factors of the rate while at the same time refusing to consider evidence that the applicant railroads would receive the revenue from the non-competitive reshipping rate factor whether corn was brought to the reshipping point by water or by rail, whereas the inbound rail rate factor would not be sufficient to cover out-of-pocket costs of the applicants on the inbound rail haul?

4. In a proceeding under Section 4 of the Interstate Commerce Act instituted after duly filed protests alleged violations of the National Transportation Policy and of other sections of the Act, was it error for the Interstate Commerce Commission to authorize a rate violating Section 4 without considering duly presented evidence, introduced without objection, that such rate would violate other sections of the Act and the mandate of the National Transportation Policy, and excluding other evidence to like effect?

5. In a proceeding under Section 4 of the Interstate Commerce Act was the conclusion of the Commission that the applicant rail carriers had shown a special case authorizing the establishment of the rate in question (contrary to the examiner's findings) based on requisite findings supported by substantial evidence?

STATEMENT OF THE CASE.

Plaintiff Mechling is a common carrier certificated under Part III of the Interstate Commerce Act and among other things operates barges for the transportation of grain on the Illinois River to Chicago, Illinois from the north and central Illinois grain-producing area. The various other plaintiffs are operators of grain elevators located between the Illinois River and the New York Central Railroad's Kankakee Belt Line west of Kankakee, Illinois.

The intervening plaintiff, Chicago Board of Trade, maintains the principal price-making market for corn in the United States, offering among other things facilities to trade in corn arriving in Chicago by barge, rail or lake vessel for reshipment to destinations east of Chicago.

Applicants before the Commission were various eastern, southern and western railroads which maintain various rail routes by which corn brought from stations on the Kankakee Belt Line to Kankakee may be transported to eastern destinations at the published reshipping or proportional rates.

The Kankakee Belt Line runs roughly parallel to the Illinois River in an east-west direction for about 75 miles in north central Illinois, lying from four to 39 miles south of the river.

On behalf of various connecting railroads the Traffic Executives Association-Eastern Railroads applied on June 28, 1957, to the Commission for relief from the long-short haul rate prohibition of Section 4 with respect to rates on corn products moving to the east from origin stations west of Kankakee, Illinois, on the New York Central Railroad's Kankakee Belt Line. The departure from the long-short haul rate prohibition of Section 4(1) had been created when the New York Central Railroad Company

(N.Y.C.) promulgated a separately-published blanket proportional rate of 5¢ per cwt. (later increased to 5½¢ and then 6¢ per cwt. by general rate increases) on corn brought from any of these origins into Kankakee for reshipment to the east with milling in transit required,[1] and the applicant railroads made the already established reshipping rate from Kankakee applicable to the corn products milled from such corn. The resulting combinations of the 5½¢ inbound rate and the reshipping rates were substantially lower than the local rates from Kankakee and from intermediate stations in Indiana to the same destinations.

The inbound rates to Kankakee from the Kankakee Belt had formerly ranged up to 23½¢ per cwt., and the justification for the fourth section departure alleged by the applicant railroads was the necessity to meet water competition, *viz.*, barge transportation of corn to Chicago for reshipment by rail to the east at the rail reshipping rate from Chicago. The reshipping rates to the east were the same from both Chicago and Kankakee, and remained unchanged.

All the plaintiffs and the intervening plaintiff, as well as many other grain merchants, processors and elevator associations, protested the 5½¢ rate as being unreasonably low in violation of Section 1(5), non-compensatory in violation of Section 4, destructively competitive in violation of the National Transportation Policy and Section 4, and discriminatory against Chicago and against other origin stations near the Belt in violation of Section 3(1). At a hearing from January 29 to February 4, 1958, the

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[1] The application stated that the rate was applicable to corn. In fact, however, the reduced inbound rate could not be applied to whole corn delivered to the eastern destination, because of the milling-in-transit requirement.

Commission's examiner received evidence on all these points without objection.

The evidence showed and the examiner found in his proposed report of March 16, 1959, that the 5½¢ rate failed to meet the inbound carrier's out-of-pocket costs (Appendix E, Sheets 24-25). The examiner recommended that relief not be granted at that rate level. In its report dated June 8, 1960 the Commission refused, however, to consider the propriety of the inbound rate by itself under either Section 1(5) or Section 4(1) on the ground that the rate was a proportional rate having no independent existence and the Commission must therefore consider in the fourth section proceeding only the combination rates rather than the individually published inbound factor designed to meet the competition used as the justification for the fourth section departures involved (310 I.C.C. at 450, Appendix C). In other proceedings, however, both the Commission and this Court had considered such separately-published proportional rates by themselves to test their compliance with the Act. *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 279 U.S. 768 (1929). As partial justification for this latter position the Commission stated that the applicants theoretically could have published single-factor rates, rather than separately-published factors, thereby making less dramatically apparent the subsidization of non-compensatory water-competitive rail rates by revenue from non-competitive rail traffic. Single-factor rates were never suggested at the hearing by the applicant railroads nor explored in the evidence. There is no evidence that the applicants (either as a theoretical or practical matter) could or would have published single-factor rates. No such rates were in issue. If single-factor rates were published, additional questions would arise on which protestants would wish to be heard.

Furthermore the Commission refused to consider the evidence of discrimination against the City of Chicago, again on the ground that violations of other sections of the Act by the rates were not pertinent in a fourth-section proceeding (310 I.C.C. at 451).

Evidence that divisions of the Kankakee reshipping rate, when the traffic was routed via Chicago under the fourth section departure rates the Commission authorized, and changed hands there, led to lower rail charges on the ex-rail grain moving from Chicago to the east than on ex-barge grain shipped from Chicago to the east in violation of Section 3(4), likewise was ignored without comment, but presumably on this same ground.

The Commission failed to make any finding at all on evidence that showed that the barge traffic to Chicago (which the 5½¢ rate was designed to divert to the railroads) was, prior to the publication of the non-compensatory inbound rate, already being transported to the east by the applicant railroads at the same reshipping rate and revenue which they received from their transportation of the corn from Kankakee. Thus the only additional revenue which the applicant railroads can have from barge traffic diverted to the rails by the combination rate is the *inbound* rate, which is insufficient to cover out-of-pocket costs. The result is that the net revenue position of the applicant railroads is impaired by the use of the 5½¢ rate. This Court and the Commission hitherto had held that a special case to sustain an order authorizing a fourth section departure was not shown if the reduced departure rates resulted in a loss of net revenue to the applicant railroads and no showing is made as to why such loss should be allowed. (*Intermountain Rate Cases*, 234 U.S. 476, 483 (1914); *Transcontinental Cases of 1922*, 74 I.C.C. 48, 77-81 (1922)). The applicants made no

such showing and yet the Commission failed to make any finding on this crucial point. The consequence is that the barge traffic is diverted to the applicant railroads with a consequent loss of net revenue to both the barge lines and the railroads.

The Commission recognized the evidence showing that the cost of barge transportation to Chicago was about 10¢ per cwt. *lower* than the rail cost from Belt stations to Kankakee. The Commission refused to comply with the mandate of the National Transportation Policy to preserve this inherent low cost water advantage, dismissing the evidence with the extraordinary conclusion that the inherent low cost advantage of water transportation, which Congress directed it to preserve, will not be preserved when the Commission considers its elimination not to be a destructive competitive practice:

> "The barge carrier is not entitled under the act to have its rates protected from a competing mode of transportation, where, as in this instance, the railroad's efforts to secure traffic do not amount to a destructive competitive practice." 310 I.C.C. at p. 450.

Finally in numerous instances the Commission made findings of fact, particularly as to those facts relating to the competitive effect of the 5½¢ rate on barge transportation, which did not differ materially from those of the examiner, but drew diametrically opposite conclusions that defy logic. An example is found at 310 I.C.C. 443 in which the Commission, after recognizing that the rate would be reflected in the bids made to farmers by the users of the various modes of transportation,[1] compared the corn bids

[1] The lowest transportation rate would, of course, be reflected in prices bid to farmers only to the extent necessary to enable its user barely to overbid the users of competing transportation.

at Missal, Illinois on the Kankakee Belt Line, at Kernan, Illinois, located on a competing railroad and at a river port, duly finding that with the departure rates in force the bid at the Belt station *was* 1.5¢ per bushel higher than the bid at the river port. It then stated, contrary to the testimony, that to make the river bid comparable to the Belt station bid, an adjustment "must" be made in the Belt station bid which made it one cent *below* the river bid (and inferentially not high enough to divert corn from the river port). Yet the adjustment made by the Commission was *not* made by the witness supporting the application who compared rate levels at river ports and Belt stations (see Exhibit 25), and the very witness who gave the prices shown by the Commission testified that at those prices the corn in the area was then moving to the Belt railroad station rather than the river port where it had gone prior to the promulgation of the departure rates.

Similar illogical conclusions were reached from comparisons of raw statistics on barge grain traffic to Chicago in 1956 and 1957.

In its opinion the Court below adopted the Commission's position in refusing to consider evidence of violations of Sections 1 and 3 (209 F. Supp. 747). It, too, declined to consider the subsidization of non-compensatory water-competitive rail rates by revenue from non-competitive rail traffic (209 F. Supp. 748). It failed to consider the evidence of the effect of the reduced 5½¢ rate on the net revenues of the applicant railroads as a whole. It found the destruction of the barge transportation's low cost advantage in violation of the National Transportation Policy to be irrelevant (209 F. Supp. 747). It accepted without any underlying evidence and without rationality the Commission's conclusions as to the meaning of the

bid prices at river ports and the Belt stations (and the Commission's conclusions from raw statistics). The court justified its refusal to consider whether the Commission's conclusions were rational by saying that it would "not consider the 'expediency or wisdom of the order, or whether, on like testimony, it would have made a similar order'." 209 F. Supp. 749.

THE QUESTIONS ARE SUBSTANTIAL.

As have many other cases involving this same traffic, this case presents legal questions whether the Commission has drawn rational conclusions from findings of fact and whether its findings of fact were supported by substantial evidence, in the continuing struggle of water carriers and water shippers to avoid a repetition of their early twentieth century elimination by the financially more powerful railroads through the use of fourth section departure rates.

Also important and symptomatic of a recent Commission trend is the Commission's failure to make adequate findings justifying its refusal to comply with the mandate of the National Transportation Policy that the inherent low cost water advantage be preserved in the administration of all sections of the Interstate Commerce Act. See *I.C.C.* v. *Mechling*, 330 U.S. 567, 579, 580 (1947).

In addition, the case presents important questions on the construction and administration of Section 4 which have the utmost significance for the future of water transportation in this country.

By refusing to consider the evidence that the 5½¢ rate did not cover out-of-pocket costs the Commission, for the first time, has held that a new and separately-published competitive rail rate need not be compensatory, even though

designed to divert the water transportation offered as the only justification for the fourth section order required lawfully to promulgate the rate. The only justification offered for this conclusion is that a non-competitive *reshipping* rate, applicable both to corn brought to Kankakee at the non-compensatory rail rate and to corn brought to Chicago, by the competing water carrier, is high enough to make up the losses from the non-compensatory rate. This conclusion is offered by the Commission without any finding on the evidence showing that the applicant carriers will realize all the revenue from the reshipping rate whether the inbound carriage is by water or at the non-compensatory rail rate. Such a conclusion opens the door to cutthroat competition from non-compensatory rates combined in any fashion with higher non-competitive rates. If this Court does not disapprove this practice, it will require little ingenuity by the railroads to multiply such non-compensatory competitive rates without any limit other than the extent to which they can be subsidized by rail revenue from non-competitive rail traffic. Thus would end any advantage from the inherent low cost of water transportation.

In addition, the Commission, in a singular abdication of its duty to enforce the Act[1] and *contrary to its prior practice*, has treated as irrelevant all evidence of violations of other sections of the Act and of the National Transportation Policy by the non-compensatory rate. It has authorized the fourth section departure created by the rate and permitted the rate to go into effect, holding that it will not

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[1] Section 12 of the Interstate Commerce Act provides in pertinent part:

"... The Commission is authorized and required to execute and enforce the provisions of this chapter; ..." (Emphasis supplied) 49 U.S.C. §12(1).

consider the discrimination against Chicago or the competing elevators on other rail lines in the Belt area in violation of Section 3, the discrimination against the barge lines violating Section 3(4), or the violation of Section 1(5) by the reduced rate.

SECTION FOUR PROHIBITS AUTHORIZATION OF THE COMBINATION RATE. THE WATER-COMPETITIVE FACTOR IS NON-COMPENSATORY AND WATER COMPETITION IS THE SOLE JUSTIFICATION OFFERED FOR THE FOURTH SECTION DEPARTURE.

The fourth section departures authorized by the Commission's order of this proceeding resulted solely from the drastic reduction of the separately-published water-competitive inbound rate to a non-compensatory level. The barge lines end at Chicago. Water competition was the only justification alleged for the fourth-section departure. The inbound rate is the only rate to which this alleged justification can apply, and is the rate published from the "more distant point". Both the Commission and court below have ruled that the rate need not meet Section Four's requirement that "any" charge "from the more distant point" must be "reasonably compensatory for the service performed."[4] The outbound factor of the combination rate goes to the railroad making the outbound haul, which can be wholly (when the corn goes via Chicago) or partly (when the corn goes direct from

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[4] The clause in Section 4 reads as follows:

". . . the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed." (Emphasis supplied.)

In this proceeding the charge "from the more distant point" rather than "to the more distant point" is the one involved since the variations in distance are from various origin stations to the same destination stations.

Kankakee) by a different eastern railroad than the one receiving the non-compensatory inbound rate.

The Commission's application of Section Four violates not only its literal requirement (that "any" charge from the more distant point must be compensatory), but also, and more fundamentally, its purpose to protect water transportation from the cutthroat competition of non-compensatory rail charges. *It is all the more objectionable that the subsidy for the non-compensatory rate should come from the non-competitive rail reshipping rate applicable to ex-barge grain from Chicago.*

The requirement that "any" charge from the more distant point be reasonably compensatory, was introduced by the amendment to Section 4 in the Transportation Act of 1920.[5] The language did not originally appear in the House Bill, but the Senate proposed similar language and the conference committee settled on the language used.[6] In explaining the purpose of the amendment Senator Townsend stated:[7]

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[5] 41 Stat. 480. The sources of "legislative history" (sic) cited by the court below at 209 F. Supp. 748 consisted of three Commission decisions decided before the enactment of this language.

[6] H. Rep. No. 650, p. 63, H. R. Rep., Vol. 1, 66th Cong., 2d Sess. (1919-1920).

[7] The context of the pertinent portion of Senator Townsend's speech is as follows:

> ". . . The system of rate fixing has existed in this country for many, many years. Cities have been builded; the whole country has been established upon these arrangements. Some of them have been wrong. It has been wrong and is so now to fix the longer-haul rate so low that in itself it is not compensatory; that is, it does not yield its proper portion of the expense of operation of the railroad system. Then it stands to reason that the shorter routes paying the higher proportioned rate must have an additional burden placed upon them. That is wrong.

"When the committee had the bill before it I offered an amendment to that provision, which was adopted, which states positively that *no* rate shall be fixed by the Commission which in itself is not compensatory, that is, which does not yield a proper proportion to the expense of operation of the line." (Emphasis supplied)

Clearly the object was to prevent the establishment of *any* non-compensatory rail charge from any water-competitive point.

In the *Transcontinental Cases of 1922*, 74 I.C.C. 48, 70-71 (1922), the Commission, in determining what constitutes a "reasonably compensatory" rate, referred to the purpose of Congress in enacting the amendment, as follows:

"The criterion of a reasonably compensatory rate suggested by the carriers has been indicated above. It is summarized in the formula 'out-of-pocket-expenses-plus-some-profit.'

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[7] (Continued)

"When the committee had the bill before it I offered an amendment to that provision, which was adopted, which states positively that no rate shall be fixed by the Commission which in itself is not compensatory; that is, which does not yield a proper proportion to the expense of the operation of the line. We also provided that purely latent water competition shall not be the basis for the establishment of rates. What I mean by that is this:

"It has been known for a good many years that what are known as Mississippi and Missouri River points have had lower rates than longer [sic] distances on either side, because of the possibility of water competition over the Mississippi and Missouri Rivers. Evidently the object of that was to keep water transportation off both rivers." 59 Cong. Rec., Part I, p. 740, 66th Cong., 2d Sess. (1919).

"Just as we have rejected the two interpretations of 'reasonably compensatory', suggested by the protestants as too narrow, so we are disposed to reject the single criterion suggested by the carriers in the above formula as insufficient, standing alone. It is probably true that this formula was deemed by us as adequate in disposing of fourth-section applications prior to the amendments of the fourth section in the transportation act, 1920, *Fourth Section Violations in the Southeast*, 30 I.C.C., 153. We do not agree with the carriers that the fourth section has not been changed in substance. The amendment has made mandatory what theretofore rested in our sound discretion as to compensation for the service performed to the more distant point, as to circuity, and as to potential water competition. Moreover, in section 500 of the transportation act, 1920, is expressly declared the policy of Congress to foster and preserve in full vigor both rail and water transportation. We think the amendment was the Congress's way of saying that we should follow a less liberal policy in dealing with departures from the long-and-short-haul rule than had been followed in former years. Our administrative power at this time is in some respects narrower than before the amendment. The fourth section, as amended, requires the observance by us of certain administrative rules which we were enforcing prior to the amendment, but which in some measure lay within our sound discretion to modify or change. We are also required now to accord due observance to section 500 of the transportation act, 1920, which indicates the purpose of Congress—

> to promote, encourage, and develop water transportation, service, and facilities in connection with the commerce of the United States, and to foster and preserve in full vigor both rail and water transportation.

> Moreover, the requirements of section 15a may not be defeated or jeopardized by the action of particular rail carriers seeking to augment their own net earnings, irrespective of the effect of rate changes adverse to the carriers of the country generally, or of a large territorial group. *Trunk Line and Ex-Lake Iron Ore Rates*, 69 I.C.C. 589. It clearly would defeat the intent of Congress to foster transportation by rail and water in full vigor if the rail carriers were permitted, at practically little or no profit to themselves, to operate so as to deprive water carriers of traffic which the water carriers would naturally handle."

The Commission's discussion in this case has been treated as a landmark since that time. The concern it expresses for the protection of water transportation from the competition of uneconomic rail charges fairly states the contemporaneous understanding of the congressional purpose in enacting these changes in Section 4. Clearly it is not consonant with this purpose to authorize fourth section rail-rate departures created solely by the promulgation of separately-published *non-compensatory* water-competitive rail charges when the only basis urged for authorizing the fourth section departure is the existence of water competition.

This statement of the congressional purpose in the amendments of 1920 equally condemns the failure of the Commission and the court below to take any note of the evidence showing the fact that the applicant railroads actually suffer a net loss of revenue from the departure rates. The barge lines end at Chicago. The applicants carry this corn to the east without regard to whether it comes to Chicago by barge or to Kankakee by rail. The fourth section departure created by the non-compensatory

inbound rail rate gives applicants no more of this traffic than they otherwise would have on the eastern leg of the haul. They continue to have all the traffic, and to receive all the revenue for the movement to the east; their reshipping rates east to these destinations from Chicago and from Kankakee are the same. The only additional revenue realized by applicants from traffic diverted from the barge lines by the fourth section departure, created by the non-compensatory inbound rate, is the non-compensatory inbound rate itself. This Court early recognized that no difference in circumstances could justify rates so low "as to be non-remunerative, and thereby cast an unnecessary burden upon other shippers." *Intermountain Rate Cases*, 234 U.S. 476, 483 (1914). In the *Transcontinental Cases of 1922*, 74 I.C.C. 47, 77-81, the Commission specifically disapproved reduced rates which would not increase traffic sufficiently for the revenue on the increase to offset (a) the loss of revenue on traffic which would be retained in any event, and (b) the added expense of transporting the increased traffic resulting from the departure rate. Since the inbound rate will not meet out-of-pocket expenses of the inbound haul, obviously the loss created by such non-compensatory rate, cannot help but impose a burden on other traffic of applicants. It was error for the Commission to omit making findings as to the effect of the fourth section departure rates on the whole net revenue situation of those railroad applicants. *North Carolina* v. *United States*, 325 U. S. 507 (1945); *Alabama Great Southern Ry.* v. *United States*, 340 U.S. 216 (1950); *Chicago, Milwaukee, St. Paul & Pacific R.R. Co.* v. *Illinois*, 355 U.S. 300 (1958).

SECTION 12 REQUIRED THE COMMISSION TO CONSIDER AND MAKE FINDINGS ON THE EVIDENCE THAT THE RATES VIOLATED THE NATIONAL TRANSPORTATION POLICY, SECTION 1(5), AND SECTION 3(1) and 3(4) OF THE INTERSTATE COMMERCE ACT.

The Commission ignored evidence that in violation of Section 3(1) of the Act the application of the rates was designed to discriminate against Chicago, the major price-making market for corn in the United States. It further made no findings of fact which would justify its refusal to preserve the water carriers' admitted low cost advantage, notwithstanding the National Transportation Policy's mandate that this inherent advantage be preserved and that all sections of the act be enforced so as to give effect to the policy. *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567 (1947). It refused to consider the reasonableness of the separately-published inbound rate under the provisions of Section 1(5) of the act, even though such a separately-published competitive rate must be compensatory to be just and reasonable as required by Section 1(5). *Chicago & Eastern Illinois R. Co.* v. *United States*, 107 F. Supp. 118 (S.D. Ind., 1952), *aff'm'd*, 344 U.S. 917. It refused to consider evidence of, or to permit further inquiry into, the charge under the fourth section departure rates of 13¢ *less* for corn moving east from Chicago after coming to Chicago by rail on the Kankakee reshipping rate and stopping in transit at Chicago, than is assessed on ex-barge corn moving from Chicago to the same eastern destination, despite the obvious violation of Section 3(4) of the Act. *Arrow Transportation Co.* v. *United States*, 176 F. Supp. 411 (N.D. Ala., 1959), *aff'm'd sub nom. State Corporation Commission of Kansas* v. *Arrow Transportation Co.*, 361 U.S. 353 (1960); *Dixie Carriers* v. *United States, supra, Interstate Commerce Commission* v. *Mechling, supra.*

The reason given for this abandonment of the Commission's long-established duty under Section 12 to enforce all sections of the Act (see *The Tap Line Cases*, 234 U.S. 1, 29 (1914)), was that these plaintiffs and other protestants had complained of these illegalities of the rates in this proceeding without filing complaints under Section 13(1) of the Act on these same points! They had raised these points in protests filed with the Commission in reliance on repeated statements, of the Commission and this Court, that fourth section departure rates should not and would not be authorized if the rates violate other sections of the Act. *Intermountain Rate Cases*, 234 U.S. 476, 486; *City of Spokane* v. *Northern Pacific Ry. Co.*, 21 I.C.C. 400, 426 (1911); *Transcontinental Cases of 1922, supra*, p. 71; *Bituminous Coal to Buffalo, N. Y.*, 219 I.C.C. 554, 560 (1936); *Pig Iron to Butler, Pa.*, 222 I.C.C. 1, 2 (1937); *Iron & Steel to Minnesota*, 231 I.C.C. 425, 428 (1939); *Lumber from the South and Southwest*, 245 I.C.C. 67, 73-74 (1941); *Coal Briquettes in the South*, 289 I.C.C. 341, 376-377 (1953). In the *Intermountain Rate Cases* this Court specifically pointed out that any application for the Commission's authority to depart from the fourth section must be considered "in view of the preference and discrimination clauses of the second and third sections" of the Act. When these protests were filed, authority was clear and consistent.

Furthermore, good practice by the Commission should encourage the determination insofar as possible of all questions relating to these rates in one proceeding rather than requiring proliferation of proceedings on the same rates before an already over-burdened agency. As was said by Commissioner Porter in *Jamestown Chamber of Commerce* v. *Pennsylvania R.R. Co.*, 139 I.C.C. 491, 492-493 (1928):

> "We believe it desirable and in harmony with the more modern rule adopted by the courts of permitting all parties interested in the same subject matter to become parties to the litigation and so far as possible settle the entire controversy in one proceeding, to permit the intervention of parties situated as were the interveners in this case."

The Commission discourages relitigation in its Rule 101 (f), which refuses rehearings "submitted by the same party or parties, and upon substantially the same grounds as a former petition". Since the enactment of the Transportation Act of 1940 (54 Stat. 898), this Court holds that "the Commission must take 'cognizance' of the National Transportation Policy and apply the Act 'as a whole'". *American Trucking Association* v. *U. S.*, 355 U.S. 141, 152 (1957).

The Commission's present novel order requires needless multiplication of proceedings in the interest of a dryly technical formality. Courts have been trying to get free of that, and it has no place in proceedings before an agency charged with administering an act as a whole. It is a departure from prior consistent Commission practice, hitherto correctly regarded by the Commission itself as enjoined upon it by the Act and by the expressions of this Court. It is made ex post facto without prior announcement.

The justification asserted is certain remarks of a district court (made sixteen months after these plaintiffs filed their protests) in *Seatrain Lines, Inc.* v. *United States,* 168 F. Supp. 819 (S.D. N.Y., 1958), a case in which that court nevertheless did strike down the Commission's fourth section order there under consideration. The dictum from that opinion would no doubt have been more carefully considered (and would certainly have

been submitted to review) if it had in any way affected the result. It rested, expressly, on what is a rather obvious misunderstanding of this Court's decision in *United States* v. *Merchants & Manufacturers Traffic Association*, 242 U. S. 178 (1916). That was a case in which plaintiffs did not suggest the illegality of fourth section departure rates, filed no protests and did nothing at all in the fourth section proceeding until it was all over and actually decided, whereupon they sought to reopen the proceeding by petition for rehearing on grounds not raised in the terminated proceeding. This Court denied them permission belatedly to overhaul what had been done, pointing out that since they had *not* raised the illegality of the rates in the fourth section proceeding, they could still raise these questions by complaint under Section 13. The case does not even remotely imply that the Commission can ignore questions of compliance with the Act that are presented to it in timely fashion.

Commission procedures should be, and in this respect at least hitherto have been, designed to come quickly to the substantive legality or illegality of rates that it is asked to authorize rather than to enmesh parties in a procedural formality that changes without prior announcement.

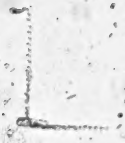
CONCLUSION.

The questions presented by this appeal are substantial and of great public importance. It is respectfully submitted that the Court should note its probable jurisdiction in order that it may be advised by briefs and oral argument on these questions.

Respectfully submitted,

EDWARD B. HAYES,
WILBUR S. LEGG,
Attorneys for Appellants (Plaintiffs Below).

LORD, BISSELL & BROOK,
135 South LaSalle Street,
Chicago 3, Illinois,
346-7475.



APPENDIX A.

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

A. L. MECHLING BARGE LINES, INC., et al.,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, et al.

No. 61 C 169

Before KILEY, Circuit Judge, and HOFFMAN and AUSTIN, District Judges.

This is a suit by Mechling Barge Lines, Inc., a common carrier, and several grain elevator operators served by barges, to set aside an order of the Interstate Commerce Commission. The order continued in existence a reduced rail rate for corn and corn products transported on the New York Central Belt Line. The Chicago Board of Trade was permitted to intervene as a plaintiff and the New York Central Railroad and several grain elevator operators on its Belt Line were permitted to intervene as defendants.

The Belt Line west of Kankakee, Illinois, roughly parallels the Illinois River on which the barges operate. The barge lines and elevators served by them are in competition with the Belt Line and elevators served by it for the business of transporting corn from northern and central Illinois to destinations on the eastern seaboard. Some farmers sell their corn to elevators for transportation by barge to an east-west railroad and others sell theirs to elevators for transportation by the north-south Belt Line to a connecting east-west railroad or to merchants in Chicago. The transportation rates are of course very important in the competition.

Prior to the published New Kankakee all-rail combination rate, the through one-factor rates for grain and grain products from Streator on the Kankakee Belt Line to New York were 72.5¢ per cwt.; the Chicago combination from stations on the Kankakee Belt Line consisted of a local rate of 23¢ to Chicago, plus the 49.5¢ reshipping rate east, or 72.5¢ per cwt.; the Kankakee combination rate from stations on its Belt Line to Kankakee and reshipping to the east was also composed of the same rate factors. Thus, the through one-factor rates, the Chicago combination and the Kankakee combination, were all equal.

The proposed new Kankakee combination reduced the rate on corn and corn products from stations on the Kankakee Belt Line to 6¢ on corn milled-in-transit for the purpose of meeting the barge competition on the Illinois River, plus a reshipping rate of 49.5¢ beyond Kankakee to the east. The local, or 6¢, rate was to apply only when the product was destined for shipment to eastern destinations. The local, or 6¢, rate was not applicable to whole corn, nor was the rate to Chicago reduced although the Kankakee combination was available to Chicago processors via Kankakee. Application of the new Kankakee combination resulted in a charge less for the longer than for the shorter distance of transportation in that a lower charge from stations west of Kankakee to the east was effected than resulted from Kankakee and intermediate origins to the same destinations.

The New York Central Railroad applied to the Commission for approval, to obviate the violations of 49 U.S.C.A. Section 4[1], of a proposed rate. Plaintiffs and the Board

[1] 49 U.S.C.A. Section 4. Long and short haul charges; competition with water routes.

of Trade protested the application. The Commission granted temporary authority for immediate application of the rate, but ordered a hearing.

The scope of review to be accorded this order is conceded by all litigants to be governed by the Administrative Procedure Act, 5 U.S.C.A., particularly Section 1009(e).[2] Because no dispute exists as to the standards to be applied, this court will allude briefly to the basic concept of such review. In *Rochester Tel. Corp.* v. *United States*, 307 U.S. 125, 140 (1938), the scope of review is stated to be as follows:

> "* * * Only questions affecting constitutional power, statutory authority, and the basic prerequisite of proof can be raised. If these legal tests are satisfied, the Commission's order becomes incontestable. *Interstate Commerce Comm.* v. *Illinois Central R. Co.*, 215 U.S. 452, 470; *Interstate Commerce Comm'n* v. *Union Pacific R. Co.*, 222 U.S. 541."

Plaintiffs claim error in the refusal of the Examiner and the Commission to admit evidence that the proposed rate was discriminatory, unjust and unreasonable, in violation of the Transportation Act;[3] and that the rate failed to preserve the inherent advantage that the National Transportation Policy[4] gives the water carrier. The evi-

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[2] Section 1009(e) provides for the scope of judicial review of agency action to ensure that such action is not unlawfully withheld or unreasonably delayed, or not in accordance with law, procedural or substantive, and that such action is warranted in fact and supported by substantial evidence.

[3] 49 U.S.C.A. Section 15(1).

[4] The declared national transportation policy is to provide, preserve and promote the "fair and impartial regulation of all modes of transportation * * * to recognize and preserve the inherent advantages of each," in order to ensure a national transportation system adequate to meet the needs of commerce and national defense. 49 U.S.C.A. note preceding Section 1.

dence was excluded for the reason that it was not appropriate in this "Fourth Section" proceeding although it would be pertinent upon a complaint under Section 13(1)[5] or a Commission investigation under Section 15(1).[6]

Plaintiffs argue that the Examiner and Commission were bound not to grant the application under Section 4 if to do so involved violation of the other sections noted. We are referred to the Commission's conclusion that granting the application "would not be disharmonious with the other provisions of the Act," to show what the plaintiffs contend is an inconsistency.

We may disregard that conclusion as surplusage and we see no error in the exclusion of the evidence of violation of other sections of the Act. The relief granted is permissive only and the evidence offered was not relevant in this Fourth Section proceeding. *United States* v. *Merchants & M. Traffic Ass'n,* 243 U.S. 178 (1916). Due regard was given to the policy and statutory scheme of the Act within the limits afforded by Section 4 and under that Section the Commission is not required to make specific ultimate findings that a rate is lawful and not discriminatory. The water carrier and other plaintiffs have failed to utilize the provisions of sections of the Act which afford the Commission the proper scope for such determination. *United States* v. *Merchants & M. Traffic Ass'n,* 242 U.S. 178, 188 (1916); *Koppers Co.* v. *United States,* 132 F. Supp., 159, 163 (D.C. Pa., 1955); *Florida Citrus Comm'n* v. *United States,* 144 F. Supp. 517, 526 (D.C. Fla., 1956); *Seatrain Lines* v. *United States,* 168 F. Supp. 819, 825 (D.C.N.Y., 1958).

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[5] 49 U.S.C.A. Section 13(1).
[6] 49 U.S.C.A. Section 15(1).

The Commission found that the "competitive situation which prevailed prior to the proposed rate between the all-rail and barge-rail rates" needed an adjustment under Fourth Section relief. It required a showing that the proposed rates are "reasonably compensatory and no lower than necessary to meet the competition." It found that the evidence that the proposed rate was compensative and set forth the details supporting that finding, and concluded that the New York Central had shown "a special case within the meaning of Section 4[7] of the Act by nature of actual and compelling competition," and that the rate was no lower than necessary to meet that competition, was not destructively competitive and would not impose an undue burden on other traffic.

The question raised upon these findings and conclusions is whether the Commission was correct in considering the entire combination rate within the compensatory test of Section 4, or whether, as the Hearing Examiner did, it should have confined such test to the local rate from Moronts to Kankakee, *i.e.*, the 6¢ rail charge for the trip from the western origins of the Kankakee Belt Line to Kankakee. Admittedly, the only rate competitive to the barge route is the local or proportional rate to Kankakee, there having been no change in the 49.5¢ reshipping rate to the east. However, as the Commission emphasized, the

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[7] Section 4 of the Transportation Act provides:

"* * * That upon application to the Commission and after investigation, such carrier, in special cases, may be authorized by the Commission to charge less for longer than for shorter distances for the transportation of . . . property . . . but in exercising the authority conferred upon it by this proviso, the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and no such authorization shall be granted on account of merely potential water competition not actually in existence; . . ."

6¢ charge is not collected separately. When shipments originate west of Kankakee they are shipped to Kankakee via the local or flat rate of 23¢ and only when there is a reshipment for corn milled-in-transit to points east of Kankakee will the 6¢ rate be applied. Thus, on reshipment east, there is adjustment made giving recognition to through shipping by reducing the flat or local rate to the 6¢ figure. Consequently, the 6¢ does not exist as a separate charge, but exists only when the combination rate comes into being and a departure from the prohibition of Section 4 occurs when the 49.5¢ reshipping rate is applied. It is clear from the legislative history of this section that Congress was concerned with the long-haul being reasonably compensatory to the carrier and that the Commission so find to grant Section 4 relief. See *Detroit Board of Trade* v. *Grand Trunk Railway*, 2 I.C.C. 199, 202 (1888); *Imperial Coal Co.* v. *Pittsburgh & L.E. R. Co.*, 2 I.C.C. 436, 445 (1889); and *Sheldon Axle & Spring Co.* v. *Lehigh* v. *R.R. Co.*, 53 I.C.C. 43, 44 (1919). The Commission was correct in considering the combination rate and not the single 6¢ proportional.

The final question is whether the report and the findings and conclusions are supported by substantial evidence in the record as a whole. A departure from Section 4 is accorded only in special cases. The record is replete with exhibits and testimony which show that prior to the changed rate almost all free corn, as distinguished from government corn, grown in the geographical area involved was shipped via barge to Chicago and thence by rail to its eastern termini. This obvious disparity of corn shipment was found to exist by the Hearing Examiner and the Commission. 310 I.C.C. 438-441. That a special case exists by virtue of actual and compelling competition has been recognized. *In re Louisville & Nashville R.R. Co.*, 1

I.C.C. 31, 78 (1887); *Intermountain Rate Cases, supra; Skinner & Eddy Corp.* v. *United States,* 249 U.S. 557 (1919); *Nepheline Syenite from Ontario, Canada to the East,* 308 I.C.C. 561, 564-565 (1959).

A reasonably compensatory rate was defined by the Commission in the *Transcontinental Cases of 1922,* 74 I.C.C. 48, 71, as follows:

> "• • • We are of the opinion and find that in the administration of the fourth section the words 'reasonably compensatory' imply that a rate properly so described must (1) cover and more than cover the extra or additional expenses incurred in handling the traffic to which it applies; (2) be no lower than necessary to meet existing competition; (3) not be so low as to threaten the extinction of legitimate competition by water carriers; and (4) not jeopardize the appropriate return on the value of carrier property generally, as contemplated in Section 15(a) of the act."

These criteria have received judicial approval. See *Dixie Carriers* v. *United States,* 143 F. Supp. 844 (D.C. Tex., 1956). In the instant case comparative earnings, rate levels and operating costs were submitted to support the compensativeness of the proposed rate. 310 I.C.C. 437, 448-449. This was a proper formula to support the Commission's finding. *Fed. Power Comm'n* v. *Natural Gas Pipeline Co.,* 315 U.S. 575, 586 (1942); *United States* v. *Northern Pacific Ry. Co.,* 288 U.S. 490, 500 (1933); *Youngstown Sheet & Tube Co.* v. *United States,* 295 U.S. 476, 480 (1935); *City of Harrisonburg* v. *Chesapeake & O. Ry. Co.,* 34 F. Supp. 64, 644-645 (D.C. Va., 1940); *Tidewater Associated Oil Co.* v. *A. T. & S. F. Ry. Co.,* 278 I.C.C. 586, 589; *Summer Co.* v. *Erie R. Co.,* 262 I.C.C. 43, 46. In finding that the rate was no lower than necessary, the Commission also examined the bid prices of the two modes of transportation and the effect they had on those country

elevators located between the Illinois River and the Belt. In finding that the rate was not destructive of competition nor unduly burdensome, the Commission had before it evidence of the amount of corn shipped via the two modes of transportation in the periods here in question.

In scrutinizing the evidence upon which the order is premised, the court will not consider the "expediency or wisdom of the order, or whether, on like testimony it would have made a similar ruling,". *Interstate Commerce Comm'n* v. *Union Pacific R. Co.*, 222 U.S. 541, 547, 548 (1911); *Virginian Railway Co.* v. *United States*, 272 U.S. 658, 663 (1926); *United States* v. *Pierce Auto Lines*, 327 U.S. 515, 536 (1945), but will consider only whether in the record as a whole there is substantive evidence to support the order. 5 U.S.C.A. Section 1009(e); *Universal Camera Corp.* v. *Labor Board*, 340 U.S. 474 (1950).

There is no challenge of the detailed facts underlying the findings or conclusions and we find that there is the requisite substantial basis for the findings and conclusions. *Rochester Tel. Corp.* v. *United States*, 307 U.S. 125, 140.

We conclude that the order in question was within the statutory power of the Commission, that it is supported by findings and conclusions based on substantial evidence, and that no prejudicial error occurred in the hearings before the Examiner and Commission. For these reasons we think the complaint should be dismissed. The order of dismissal is being entered this day.

DATE: September 18, 1962.

APPENDIX B.

IN THE UNITED STATES DISTRICT COURT
For The Northern District of Illinois
Eastern Division

A. L. MECHLING BARGE LINES, INC., et al.
v.
UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, et al. } 61 C 169

JUDGMENT.

The above entitled cause having come on for final hearing before a duly constituted district court of three judges convened pursuant to Sections 2284 and 2326 of Title 28, United States Code, and the Court having considered the pleadings and the record before the Commission, and the arguments and briefs of counsel, and the Court being fully advised in the premises and having filed its opinion, it is hereby

Ordered, Adjudged and Decreed that the relief prayed for in the complaint be, and it is hereby, denied, and the complaint is dismissed, plaintiff to pay the costs.

Dated this 18th day of September, 1962.

/s/ Roger J. Kiley
Judge, United States Court of Appeals
/s/ Julius J. Hoffman
Judge, United States District Court
/s/ Richard B. Austin
Judge, United States District Court

29098

INTERSTATE COMMERCE COMMISSION

FOURTH SECTION APPLICATION No. 33955

CORN AND CORN PRODUCTS FROM ILLINOIS TO OFFICIAL TERRITORY

Decided June 8, 1960

Authority granted, on conditions, to continue or to establish and maintain on corn products from origins in northern Illinois on that part of the New York Central Railroad's Kankakee Belt Line extending eastward from Moronts to Van's Siding, Ill., both inclusive, to points in central, trunkline, and New England territories, rates composed of a combination of proportional rates to and from Kankakee, Ill., without observing the long-and-short-haul provision of section 4 of the Interstate Commerce Act.

Richard J. Murphy, *William C. Leiper*, and *Daniel J. Sweeney* for applicants.

Freeman Bradford, *Leo P. Day*, and *A. C. Schier* for interveners in support of the applicants.

Edward B. Hayes, *Wilbur S. Legg*, *Nuel D. Belnap*, *Harold E. Spencer*, *Richard J. Hardy*, *Richard M. Freeman*, *James V. Springrose*, *Lawrence Farlow*, *James C. Scott*, *I. M. Funk*, *Ronald E. Tallyn*, *E. S. Herron*, *R. D. Erickson*, and *J. S. Chartrand* for protestants.

REPORT OF THE COMMISSION

DIVISION 2, COMMISSIONERS HUTCHINSON, MCPHERSON, AND HERRING

BY DIVISION 2:

The parties filed exceptions to the report proposed by the examiner, to which replies were made. We have heard the parties in oral argument. Our conclusions differ from those recommended in the proposed report. Exceptions and requested findings not discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

By this application, as amended, carriers parties to the New York Central Railroad Company tariff I.C.C. No. 1169 and Agent H. R. Hinsch's tariff I.C.C. Nos. 4403 and 4499, apply for authority to continue or to establish and maintain over their existing direct all-rail routes for the transportation of corn products from origins in northern Illinois on that part of the New York Central's Kankakee Belt Line extending eastward from Moronts to Van's Siding, Ill., both inclusive, to points in central, trunkline, and New England territories, rates composed of a combination of proportional rates

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to and from Kankakee, Ill., as hereinafter described, without observing the long-and-short-haul provision of section 4 of the Interstate Commerce Act.

The schedules containing the rates and the application were protested by A. L. Mechling Barge Lines, Inc., hereinafter called Mechling, Cargill, Inc., and the Waterways Freight Bureau, as well as by the Board of Trade of the city of Chicago, the Indiana Board of Trade, two State associations of Illinois elevators, the Illinois Grain Corporation, the Norris Grain Company, and others. The General Foods Corporation, Indianapolis Board of Trade, Evans Milling Company, Illinois Cereal Mills, and several operators of elevators on the Kankakee Belt Line of the New York Central intervened on behalf of the applicants. Suspension was denied, and fourth-section relief was granted temporarily by order No. 18784, entered August 27, 1957, until further order after hearing.

However, on August 28, 1957, certain of the protestants filed an appeal with the United States District Court for the Northern District of Illinois, Eastern Division, to set aside the Commission's temporary fourth-section order and to enjoin the use of the rates without fourth-section relief. A temporary restraining order was issued on that date making the Kankakee combinations inoperative until November 28, 1957, when the court order was vacated and the court action dismissed.

A hearing has been held in the matter of the fourth-section relief sought and several of the respective parties introduced testimony and other evidence according as their interests were affected. In the interest of clarity the rates for which fourth-section relief is herein sought will be referred to as the proposed rates, and those in effect previously as the prior rates. Except as otherwise indicated, all rates and charges are stated in amounts per 100 pounds, include the increase authorized in Ex Parte No. 206, and are subject to the increase authorized in Ex Parte No. 212.

The proposed reduced rates are designed to recapture traffic represented as having been lost to competing barge lines operating by way of Chicago in conjunction with rail lines beyond. The carriers do not desire to reduce existing rates at higher rated intermediate points not affected by the same competitive conditions.

Historically, the rail rates on grain and grain products from northern Illinois, including the considered origins, to eastern destinations were combinations over Chicago, Ill., and later when single-factor rates were established they were made equal to the combinations, the rates on the corn products having been maintained uniformly 0.5 cent higher than the rates on grain. On traffic accorded transit, the local or flat rates were generally observed to the gateway points, for example Chicago or Kankakee, and the

reshipping rates therefrom applied on the outbound movement, observing as minimum the single factor through rate or the flat rate from the gateway, whichever was higher, in conformity with outstanding fourth-section relief.

In an effort to meet the competition of the barge-rail routes, effective December 15, 1956, the New York Central established a proportional rate of 5 cents (subsequently increased to 5.5 and 6 cents, respectively, under Ex Parte Nos. 206 and 212), minimum 100,000 pounds, on corn and corn products from the considered origins to Kankakee over its line direct for application in conjunction with the existing proportional or reshipping rates beyond on traffic milled in transit and finally destined to points in the western termini of eastern trunklines and east thereof. At the same time, the through single-factor rates from these origins to final destination, as well as the flat rate from Kankakee to final destination, previously observed as minimum in connection with the prior rates, were restricted so as not to apply when the combination of the proposed proportional rates to and from Kankakee to final destination is lower. The proposed rates were permitted to become effective at that time without protest and were published in the belief that outstanding relief protected any departures which might occur. However, it was subsequently discovered that by limiting the rates to points at the western termini of eastern trunklines and east thereof, unauthorized departures were created at destinations in central territory. Moreover, by eliminating the application of the single-factor through rates from origin to final destination, as well as the flat rate from Kankakee to final destination as minimum, origin departures were created at Kankakee and points east, north, and south thereof. To eliminate the unauthorized destination departures the same combination of proportionals was established for application on like traffic from the same origins to destinations in central territory effective July 30, 1957, which date was voluntarily postponed until August 29, 1957, and because of the temporary restraining order entered by the court did not become effective until November 28, 1957.

The considered rates, as indicated, are designed to meet the barge-rail combination rates over Chicago, comprising the local barge rates to Chicago and the rail reshipping rates to eastern destinations, which are the same as in effect from Kankakee. The local barge rates from 10 Illinois River ports [1] to Chicago ranged from 3.5 to 6 cents on December 5, 1957, and effective December 6, 1957, 3.65 to 6.25 cents when they were increased slightly. There is no milling-in-transit requirement for the application of the barge-rail combination

[1] Lockport, Joliet, Morris, Seneca, Ottawa, La Salle, Spring Valley, Hennepin, Henry, and Lacon, Ill.

rates. In arriving at the inbound proportional under the proposed rates, the weighted average barge rate of 4.625 cents on the barge movement for the period December 16, 1956, to November 11, 1957, from the 10 ports to Chicago was considered as the competitive rate. On the same movement the weighted average barge rate would be 4.825 cents effective December 6, 1957.

The proposed rates have application only in connection with the reshipping rates on grain products insofar as they apply on certain corn products. In the first instance the corn is moved from its Belt origin to Kankakee or other transit points in official territory under the flat rate. After milling in transit and reshipment of corn products, the inbound charges are readjusted on the basis of the proportional rate on corn to Kankakee and the reshipping rates on grain products from Kankakee, and the credit is applied to the outbound movement of corn products. Charges for the shrinkage and manufacturing loss remain on the basis of the local rate to the transit point.

The Kankakee Belt Line west of Kankakee roughly parallels the Illinois River in northern Illinois. Moronts is on the river about 4 miles from the nearest river port of Spring Valley, Ill., and Van's Siding, which is the most distant point from the river, is about 32 miles south of its nearest port of Joliet, Ill. The northern Illinois territory produces a surplus of corn. At one time, the corn moved over all-rail routes to eastern destinations. However, the development of commerce on the Illinois River about 20 years ago started a diversion of the all-rail movement to barge-rail routes extending from river ports by barge to Chicago, Ill., and thence by rail to eastern destinations. In 1935, 1940, and 1957, respectively, about 1.5, 19, and 59 million bushels of grain, including 0.7, 16, and 34 million bushels of corn, moved by barge from all Illinois River ports to Chicago. The bulk of the corn moved by barge originates at the 10 river ports which range from 4 to 36 highway-miles from the Belt origins, and is drawn from farms ranging up to 40 miles from the ports.

The primary business available to the New York Central at the origin points is grain, predominately corn, traffic. During 1954, 1955, and 1956, respectively, 467, 729, and 615 carloads of grain, including 305, 533, and 464 carloads of corn originated thereat. Most of it was Commodity Credit Corporation corn[3] which is usually shipped by rail for export, and is not subject to the same competitive forces as "free" corn.[4] In 1957, however, for the 6-, 8-, and 12-month periods ended June 30, August 31, and December 31,

[3] Corn under Government control.
[4] Corn available on the open market.

1957, respectively, 1,915, 2,411, and 2,681 carloads of corn were originated at the Belt origins.

The 1956 corn crop in the area was somewhat heavier than the 1955 crop, thus increasing the movement in 1957. During the period December 15, 1956, to August 30, 1957, hereinafter called the competition period, when the proposed rate was in effect the corn movement by barge from the 10 river ports to Chicago amounted to 493,668 tons, including 387,256 tons by protestant A. L. Mechling Lines, Inc.[4] Lockport and Joliet, the river ports nearest Chicago, are not affected by the reduced rate to the same extent as the other ports. From Hennepin, Henry, and Lacon, the three ports south of Morenta, the greater part of Mechling's corn business moved to the south in 1956 and north to Chicago in 1957. From the other five ports affected, Mechling's barge movement to Chicago was lower by 22,928 tons in the competition period than during the corresponding period a year earlier.

Cargill Incorporated, Illinois Grain Corporation, Norris Grain Corporation, W. W. Dewey Company, and Glidden Company, operate subterminal elevators at one or more of the ports. Cargill Incorporated's corn purchases at three elevators from the area south of the river dropped from 1,632,092 bushels in the period December 15, 1955, to August 31, 1956, to 1,171,329 bushels in the competition period. From the same area Illinois Grain Corporation purchased 854,826 and 365,005 bushels during the first 8 months of 1956 and 1957, respectively. Norris Grain Corporation experienced purchase declines in 1957 under 1956 at three elevators. The decline at the one elevator most affected amounted to 646,380 bushels in the first 6 months of 1957 under the first 6 months of 1956. W. W. Dewey Company's purchases from four points on the Belt were reduced from 120,000 bushels in the first 8 months of 1956 to 15,000 bushels in the same period of 1957. Glidden Company's elevators were opened in the fall of 1956. Its limited experience indicates a decline in purchases in the area subsequent to the effectiveness of the proposed rate.

The river subterminal elevators are intermediate between the terminal elevators in Chicago and the country buyers in northern Illinois. They are generally operated by the terminal elevators and were established to accumulate corn for river movement. With the exception of Dewey, which purchases both from country buyers and direct from the farmer, this accumulation is by purchase through the country elevatorman. Originally the country elevators sold to

[4] Includes A. L. Mechling Barge Lines, Inc.'s, wholly owned subsidiary, Marine Transit Company.

buyers for all-rail movement. Their facilities were designed to receive grain from the farmers, assemble it in carload lots, and load it into rail cars, these being the same functions as to rail corn as are performed by the subterminal elevators to barge corn. The advent of river transportation and the establishment of subterminal elevators opened another outlet for the corn. In the years immediately preceding the establishment of the proposed rate, when the corn rates on the Belt were prohibitively high, the country elevators near or at the Belt became, for the most part, buyers or merchandisers of corn for barge movement, and elevated only small quantities of corn for which there were local retail requirements. For his service, the country elevatorman realizes from 1 to 4 cents a bushel depending on whether he actually performs an elevation or merely serves as a merchandiser.

The corn is moved from the farms to the elevators in farmer-owned or for-hire trucks, the cost of which, in either case, is borne by the farmer. Most of the corn sold at the river comes directly from the farm with only a small portion coming from the country elevators. The for-hire truck rates are on a distance scale filed and fixed by the Illinois Commerce Commission. They range from 2 to 4 cents a bushel for distances ranging up to 30 miles.

Bids to the farmers are based on the price at the most advantageous terminal market less the country buyers markup and transportation costs. River bids are f.o.b. trucks at river elevator, while Belt bids are f.o.b. rail cars. At the Belt, the farmer stands the cost of elevation; at the river, he does not. Prior to the proposed rate, the free corn sales of elevators on the Belt were made to the river elevators, because corn for river transportation commanded higher prices than corn for rail transportation. The higher prices were attributed to the ability of the river buyers to market the corn at lower transportation costs over the barge-rail routes than rail buyers over the all-rail routes. Since the effectiveness of the proposed rates, it became more profitable for these Belt elevators to ship by rail, and the farmers benefited by the competitive bidding. Despite their ability to pass on to the farmers the advantage of competitive bids, these Belt elevators assert that the amount of corn handled by them has not increased. There is a difference in their business, however, for rather than performing merely the merchandising service on barge corn, they now perform an actual elevation on rail corn. Several country elevators with rail facilities from 3 to 11 miles from the Belt have established portable loaders on the Belt. The 14 supporting elevators contend that without a competitive rail rate, they would again be relegated to the status of merchandisers for

barge movement and the investments in their elevators and facilities for rail shipment would be virtually destroyed.

Of the opposing country elevators, eight are located between the Illinois River and the Belt, two are south of the Belt, one is north of the river, and one is on the river and is not served by rail. The last-mentioned elevator buys corn from farmers as much as 18 miles south of the river or within 6 miles of the Belt. Although it has not been affected by the proposed rate, it recognizes the possibility of some loss in its south territory. The others, though served by rail lines other than the Belt, sell most of their "free" corn at the river, and consequently have been adversely affected by the proposed rate. Th majority have lost "free" corn business. Most seriously affected was one located at the same point as an elevator served by the Belt. Its business exceeded 250,000 bushels in each of the years 1955 and 1956, but it shipped only 31,000 bushels in 1957[8] and nothing in January 1958. The total decline in "free" corn business of all these country buyers, under 1956, was less than 25 percent. One of them shipped a portion of its 1957 business through an elevator on the Belt at a cost of over half of its usual commission on such sales. Another located midway between the Belt and the river, actually experienced a business increase, 1957 over 1956, with most of its corn going to the river. Its rail shipments declined from 258 carloads in 1956 to 78 carloads in 1957. Another believed that the proposed rate would be a temporary situation, and to retain its farmer customers it absorbed the difference, amounting to $1,800, between bids on corn in rail cars at competitive Belt elevators and bids in cars at its elevator.

The proposed rate has enabled the Belt elevators to outbid the middlemen seeking to purchase corn near the Belt area for river shipment. On January 30, 1958, the prices bid for corn per bushel were $1.09 in car at Missal, Ill., on the Belt, $1.04⅞ in car at Kernan, Ill., on another railroad, about 3 miles north of the Belt, and $1.075 in truck at the river. Since the Belt bid is f.o.b. freight car, an adjustment to eliminate the cost of elevation (averaging 2.5 cents per bushel) would place it 1 cent below the river bid at comparable stages in the transportation chain. There is little evidence that "free" corn moves by rail on other than the Belt line from stations between the Belt and the river. The Kernan bid less the cost of elevation would net the farmer $1.02⅜ in truck at Kernan. The river bid less the 2¾-cent truck rate to the river would net the farmer $1.04¾ in truck at Kernan.

[8] The effectiveness of the proposed rate was enjoined from August 28, 1957, to November 28, 1957.

The Farmers Grain Dealers Association of Illinois and the Illinois Grain Dealer's association, each of which has a membership of approximately 800 country elevators with facilities at about 400 rail stations in Illinois, ask for the restoration of the former competitive position among their members. It is their position that the rate from one station on one railroad must be competitive with the rate from another station on another railroad; that such rail rates should be competitive with other modes of transportation; and that such fourth-section relief as may be necessary should be granted to enable the railroads to compete with Illinois River barge lines.

Opposed to any fourth-section relief is the Indiana Farm Bureau Cooperative Association, a federated cooperative of about 86 associations with a total membership, mostly farmers, of about 160,000. It is a member of both the Board of Trade of the city of Chicago which opposes, and the Indianapolis Board of Trade, Inc., which supports, the applicants. It operates a 5.5 million bushel elevator on the New York Central at Indianapolis, Ind., and a 2.5 million bushel elevator in Louisville, Ky. It handles about 25 million bushels of corn annually, a large part of which is marketed in official territory. Among its 150 to 200 Indiana shipping points are stations intermediate from Kankakee to eastern destinations on the New York Central from which the rates on milled-in-transit corn to those destinations are as much as 10 cents higher than the proposed rates. Combination rates on corn via barge to Chicago thence by rail to these destinations are lower than the local rates from intermediate Indiana destinations and are applicable over Kankakee as well as Chicago. Shifting some of the Belt corn from barge to rail, which is the effect of the proposed rates, would not alter the present competitive relationship at eastern markets between it and Indiana corn.

In its study of the competitive situation, the New York Central made inquiries of corn processors at Kankakee, Paris, and Danville, Ill., and Indianapolis, Ind., as well as country elevators on the Belt. Three of the processors, General Foods Corporation at Kankakee, Illinois Cereal Mills at Paris, and Evans Milling Company at Indianapolis, support the proposed rate. Until the effectiveness of the proposed rate, the corn purchases of General Foods in the northern Illinois territory for rail delivery amounted to about 1.5 carloads a week. After the proposed rate became effective, it received 1,101 carloads during the first 8 months of 1957. In the same period, Illinois Cereal and Evans Milling received 327 and 219 carloads, respectively, from Belt origins. Immediately prior to 1957, Illinois Cereal received only two carloads in 3 years, and Evans Milling did not receive any cars in 15 years, from Belt origins. Of the 1,915 cars of corn originating on the Belt in the first 6 months of 1957,

1,326 cars, reflecting 70 percent of the total, were destined to Kankakee, Indianapolis, Paris, and Danville, and 548 to Chicago. Practically all, if not all, the 1,326 cars consisted of "free" corn on which the proposed rate would apply, while to Chicago, 31 cars were of "free" corn taking the proposed rate, and 517 were Commodity Credit Corporation corn to which the proposed rate would not apply. From the Belt origins to Chicago, the "free" corn movement aggregated 270 carloads in the 12-month period ended October 30, 1956, and 45 cars in the same period a year later.

According to General Foods Corporation, the proposed rate has enabled rail buyers to bid for corn in the country market in competition with river buyers, but a difference in the price which would be offered to the farmer still exists in favor of the river subterminal elevators. It computes differences of 9.28 and 0.63 cents a bushel before and after the effectiveness of the proposed rate, respectively. To determine the prices which could be offered to the farmer at the river elevator at Morris, Ill., and at the country elevator at Blair, Ill., it used a Chicago market price of $1.15 a bushel, from which it subtracted costs of 14.32 cents [6] a bushel on rail originations prior to the proposed rate, leaving $1.0068 a bushel as the amount which could be offered to the farmer at the country elevator; 5.67 cents [7] a bushel on rail originations since the effectiveness of the proposed rate leaving $1.0933 a bushel as the amount which could be offered to the farmer at the country elevator; and 5.04 cents [8] a bushel on river originations leaving $1.0996 a bushel as the amount which could be offered to the farmer at the river elevator.

Based on the actual daily bids at five Belt points and five river points during the 7-month period ended July 31, 1957, the Belt bids averaged 2.02 cents a bushel higher than the river bids. The belt bids, however, were f.o.b. rail car, after elevation; while the river bids were f.o.b. trucks, prior to elevation into barges. By adjusting the bids to a similar basis for comparison, the river bids are seen to be higher on the average than the rail bids.

The record indicates that the use of different moisture discount scales brings about different levels in bids, thus complicating the price picture and making it difficult to determine what the ultimate price paid will be under each scale. General Food's bids were on

[6] Reflects the proportional rail rate from Blair to Chicago of 20.5 cents and 3 percent tax converted to 11.82 cents a bushel plus country elevator handling of 2.5 cents a bushel.

[7] Reflects the proposed rate from Blair to Kankakee of 5.5 cents and 3 percent Federal tax converted to 3.17 cents a bushel, plus country elevator handling of 2.5 cents a bushel.

[8] Reflects the barge rate from Morris to Chicago of 4.4 cents and 3 percent Federal tax converted to 2.54 cents a bushel, plus elevation at river of 1.5 cents a bushel (2.68 cents per 100 pounds) and country elevator markup of 1 cent a bushel.

moisture discounts of 1 cent a bushel for each 0.5 percent of moisture ranging from 15.5 to 23 percent. There is testimony to the effect that three other scales are in use at Chicago and other markets, but there is no evidence that the river and Belt bids actually compared were on different scales so as to require any adjustment.

The cost of trucking from farm to river elevator on barge movements offsets the cost of trucking from farm to Belt elevator on rail movements. It is borne by the farmer in either case. If he were located equidistant from a river elevator and a Belt elevator, he could truck to either at equal cost. The same would hold true for a country elevator operator trucking corn which previously had moved from the farms to his elevator. The protestants contend that it costs more to truck corn from the farm to the river than to the Belt because river elevators are up to 40 miles from the farms and for-hire trucks are usually employed, while country elevators are generally within 6 miles of the farms, and farmer-owned transportation facilities are used. The logic of this contention is elusive. From the midway point the cost of getting the corn to the river or to the Belt would be the same whether the shipper, either the farmer or elevator operator, hired or furnished his transportation. From points north or south of the midway position, shippers would enjoy offsetting geographical advantages as to movement toward the river and the Belt, respectively.

Cargill Incorporated, Illinois Grain Corporation, and Glidden Company compare barge shipper costs of 18.5,[9] 17.7,[10] and 18 cents[11] per 100 pounds, respectively, with the proposed rate of 5.5 cents, and assert that these barge costs make no provision for insurance, shipper preference for country run unmixed corn, and the usual water-carrier disabilities such as weather conditions and added handling. This comparison is not valid in that barge-shipper costs are inflated, at least to the extent that they include cost of trucking to, and elevation at, the river. The more valid comparison is that of the bids, properly adjusted as previously herein described. The bids are predicated on the market price at Chicago, the purchaser's requirements, and

[9] Includes trucking from Missal, Ill., country elevator to Ottawa, Ill., river elevator of 5.36 cents, transfer truck to barge of 2.68 cents, barge rate Ottawa to Chicago of 4.95 cents, stevedoring at Chicago of 1.15 cents, transfer barge to rail at Chicago of 4.01 cents, and outbound inspection of 0.45 cent.

[10] Includes trucking from Dwight, Ill., country elevator to Morris, Ill., river elevator of 5.4 cents, transfer truck to barge of 2.7 cents, barge rate Morris to Chicago of 4.4 cents, and stevedoring and transfer barge to rail at Chicago of 5.2 cents.

[11] Includes nominal trucking from country elevator to Seneca, Ill., river elevator of 2 cents a bushel, transfer truck to barge of 1.5 cents a bushel, barge rate Seneca to Chicago of 2.63 cents a bushel, stevedoring at Chicago of 0.75 cent a bushel, and transfer barge to rail at Chicago of 2.25 cents a bushel, a total of 10.13 cents a bushel or 18 cents per 100 pounds.

the cost of transportation to Chicago from the points where the bid is made.

The Board of Trade of the city of Chicago, though contending that the proposed rate is too low, expresses doubt that an inbound rail proportional of 18 cents based upon the barge movement costs to the shipper as submitted by the river elevators, would enable applicants to meet the barge competition. Since price is a controlling factor in the shipper selection of the transportation mode, it believes that an equitable basis would be one predicated upon the pricing of the corn at the river elevator and on the Belt. Based upon the average difference of 2 cents a bushel in the rail corn bid on the Belt over the barge corn bid at the river and the trucking charges ranging from 2 to 4 cents a bushel from country elevators to river elevators, the proposed inbound proportional, according to the Chicago Board of Trade, would be lower than competitively necessary from Belt points in the 2, 2.5, 3, 3.5, and 4 cents a bushel trucking zones by amounts of 7, 8, 9, 10, and 10.5 cents per 100 pounds, respectively. By subtracting these amounts from the Belt bids, and trucking charges from the river bids, the Belt and river average bids for the 7-month period ended July 31, 1957, would be approximately the same, differing only from 0.02 to 0.2 cents a bushel. Increases, from 7 to 10.5 cents depending upon the trucking zone, would produce inbound proportional rates ranging from 12.5 to 16 cents. The 12.5-cent rate so adjusted would apply from Belt points nearest the river and most affected by barge competition, but most distant to Kankakee, and the 16-cent adjusted rate would apply from points most distant to the river and least affected by the competition, but nearest to Kankakee. Both the simple averages of 46.4 miles and weighted average distance of 38.3 miles based upon the corn movements on the Belt during the first 6 months of 1957, from the Belt points to Kankakee, are in the 3 cents a bushel trucking zone. The adjusted rate from Belt points in that zone would be 14.5 cents, and the Chicago Board of Trade is of the opinion that the Belt points should be blanketed with this rate because the points are so treated now, and the river prices at the most competitive river elevators, Spring Valley to Morris, are blanketed. This elaborate Chicago Board of Trade proposal is defective in that it begins with the erroneous premise that the Belt bids during the comparison period were higher than river bids, when, in fact, they were not, since they applied to corn at different levels in the transportation chain. Moreover, it contemplates a situation in which shippers by barge can favorably compete with shippers by rail at points on the Belt and permits the railroad to enjoy its geographical advantage only as to corn grown south of the Belt.

Applicants submitted no cost data, but rely on comparative earnings, rate levels, and operating conditions as indicative of the compensativeness of the proposed rate.

During the 8-month period ended August 31, 1957, the corn and corn products movement of the General Foods Corporation yielded average revenues of $66.07 per car, 110,076 pounds, and $1.685 per car-mile for 39.21 miles, from Belt origins to Kankakee; $403.33 per car, 81,775 pounds, and 47.7 cents per car-mile for 845.7 miles, from Kankakee to eastern destinations; and $448.42 per car and 50.69 cents per car-mile for 884.7 miles, from Belt origins to eastern destinations. In the same period, the movement of Evans Milling Company yielded average revenues of $59.42 per car, 109,137 pounds, and $2.38 per car-mile for 24.95 miles, from Belt origins to Kankakee; and $407.33 per car, and 61.62 cents per car-mile from Belt origins to eastern destinations, including Ohio via Kankakee and Indianapolis. The proposed rates did not apply to Ohio destinations during the period, and, excluding such shipments, the car-mile earnings averaged 51.09 cents. For 1955, the average revenues of the New York Central were 40.015 cents per car-mile for its average haul of 236.58 miles. Between 1948 and 1956, inclusive, the average railroad revenue from corn ranged from 78 to 95 cents per short line car-mile. On the products of agriculture, earnings ranged from 42 to 48 cents and on selected grain and grain products (including corn and corn products) 57 to 71 cents. Distances on which the study producing these figures was based were not shown. Actual distances would produce lower earnings, but in many instances actual mileages are close to short-line mileages.

The proposed combinations from Belt origins to 18 representative destinations via Kankakee, and the reshipping rates from Chicago to eastern destinations, reflect averages of 14.4 and 13.1 percent, respectively, of the docket 28300 first-class rates. On ex-lake grain, from Buffalo and Oswego, N.Y., and Erie, Pa., to tidewater ports, applicants maintain export proportional rates which range from 6.3 to 9.5 percent of the same first-class rates. Also, from certain Belt origins to New York City and Boston, Mass., applicants maintain export rates on grain which are lower than the combination of proportionals over Kankakee. For example, from Dwight, the combination domestic rates are 59.5 and 61.5 cents to New York City and Boston, respectively, and the export rate is 54.5 cents to both ports.

The operating distance of the New York Central from Chicago to Kankakee is 75 miles compared with the weighted average distance of 38.3 miles from Belt points to Kankakee. The aggregate distances from Belt to Kankakee via truck to the river, thence barge to Chicago, and thence the New York Central to Kankakee exceeded

by 133 to 797 percent the distance from Belt points to Kankakee, and to certain eastern destinations. The distances from Chicago via Kankakee exceeded by 3.73 to 20.61 percent the distances from Belt points via Kankakee. The line of another carrier, the Illinois Central Railroad Company, from Chicago to Kankakee is more direct than that of the New York Central. The proposed rates apply from Belt points to eastern destinations via either Kankakee or Chicago.

The switching of loaded and empty grain cars from and to terminal elevators at Chicago for the transportation of corn to Kankakee, Indianapolis, Paris, and Danville by the New York Central is more complex than its handling of cars at Belt origins for movement to the same destinations. Switching charges absorbed by the New York Central on corn from Chicago to Kankakee during 2 months in 1956 averaged about 2 cents per 100 pounds. Avoidance of this cost item and the shorter weighted average distance from Belt points as compared to the distance from Chicago to Kankakee support the New York Central's contention that handling corn from the Belt points is less expensive than from Chicago. Further support lies in the fact that no additional trains or power units were needed to handle the increased corn traffic from the Belt points, since the regular trains drop off the empties when westbound and pick up the loaded cars when eastbound. The exact extent to which handling is less expensive on the Belt than at Chicago is not shown.

The New York Central, for its haul from Chicago to Kankakee, assesses the local rate, but upon transit it is credited to the Chicago reshipping rate applicable via Kankakee, out of which it was required to absorb switching charges. At the proposed rate, it receives after transit the full amount of the proposed inbound proportional rate of 5.5 cents for its haul from Belt origins to Kankakee, and avoids the Chicago switching absorption. Thus by handling traffic at the proposed rate, its revenues are increased by 7.5 cents per 100 pounds over its previous handling, and its expenses are reduced in accordance with the reduction in miles from the 75 between Chicago and Kankakee to the lesser weighted average distance of 38.3 miles from Belt points to Kankakee.

The protestants submitted a study of the system average costs [12] of the New York Central and the territorial average costs [13] of the eastern district railroads. On the average 55-ton load, the out-of-pocket costs of the New York Central and the eastern district rail-

[12] Based upon an application of cost formula Rail Form A of the Commission's section of cost finding.

[13] From our cost finding section statement No. 1-57 applying Rail Form A to expenses of the eastern district railroads, adjusted to reflect current levels.

roads are 8.56 and 8.57 cents per 100 pounds, respectively, for the weighted average distance of 38.3 miles. On minimum loads of 50 tons and for the simple average distance of 46.4 miles, the out-of-pocket costs range up to 9.66 cents per 100 pounds.

This study is intended to show that the proposed proportional rates to Kankakee are noncompensatory. It fails in this purpose, primarily because it deals only with the inbound proportional. That rate factor has no independent existence, but is an integral part of the rate which applies on the through transportation from Belt origin, through the milling-in-transit point, to delivery of the corn product at its ultimate destination. Moreover, it is only by application of the through combination that the fourth-section departures subject of this proceeding are created.

Applicants point out that, since rates from each origin to each ultimate destination could be filed as single factor rates (and be no more compensatory than under the present publication), condemnation based on finding the inbound proportional only to be noncompensatory would be tantamount to condemnation arising out of the method of publication.

The authorities cited by the protestants in support of their contention that the issue here concerns a separate component of through rates for the future the lawfulness of which may be passed on independently of the other components, are not helpful here. *Great Northern Ry. Co.* v. *Sullivan*, 294 *U.S.* 458, was a section 1 case holding that the through rate must be shown to be unreasonable in order to support a reparation award. *Atchison, T. & S.F. Ry. Co.* v. *United States*, 279 U.S. 768, condemned a railroad's attempt to increase a local rate to a transit point after the traffic was shipped out of that point by another railroad. *Cairo Board of Trade* v. *Cleveland, C., C. & St. L. Ry. Co.*, 46 I.C.C. 343, so far as is pertinent, concerned a grain rail center which was unduly prejudiced by the failure of the railroads to accord it reshipping rates comparable to those enjoyed by competitive rail centers. Somewhat similar thereto is *Atlantic Terra Cotta Co.* v. *Atlanta & W.P.R. Co.*, 151 I.C.C. 45.

For 1956, Mechling's operating ratio was 91.9 percent, and its average fully distributed costs for the transportation of corn from the six most competitive ports to Chicago were 11.4 mills and 87.93 cents per ton or 4.4 cents per 100 pounds. These expenses are about 10 cents less than the New York Central's average fully distributed costs of 14.33 and 13.57 per 100 pounds on 50-ton and 55-ton loads, respectively, for 46.4 miles, computed by protestants. According to Mechling, this difference of approximately 10 cents represents its inherent low cost advantage which must be preserved. The barge carrier is not entitled under the act to have its rates protected from

a competing mode of transportation, where, as in this instance, the railroad's efforts to secure traffic do not amount to a destructive competitive practice.

The Chicago Board of Trade and others raise certain issues, principally discrimination against whole corn by the milling-in-transit limitation; discrimination against Chicago by the proposed-rate combination applying over Kankakee when prior thereto rates to the East were made over Chicago; undue preference to the processors of corn by the limitations in the application of the proposed rate to commodities shipped by these processors; and unreasonable routes on the proposed rate combination by the restrictive routes which apply over Kankakee in movements to eastern destinations. Although the New York Central intends to remove the milling-in-transit limitation, these issues do not directly deal with the fourth-section principles here involved, but are properly matters which may be raised in investigation or complaint proceedings. However, since the proposed rates are effective over Chicago, that point has the same stature as all other corn-processing points in official territory in their application. Moreover, the routes over Kankakee are the same as they were for many years prior to the establishment of the proposed rates, and, while limited in their scope as compared to making the inbound rate break on Chicago, there is no indication of undue damage to Chicago.

It is clear that the competitive situation which prevailed prior to the proposed rate between the all-rail and the barge-rail rates on corn from the northern Illinois territory to the East required an adjustment in the all-rail rates, and that such an adjustment requires fourth-section relief. The proposed rates are intended partly to remedy the situation, and the instant application seeks the relief to cover the departures which occur. Before such relief may be granted, applicants must show that the proposed rates are reasonably compensory and no lower than necessary to meet the competition.

The country elevators in the area were originally set up to do business over all-rail routes, and yet, prior to the proposed rate, the preponderant portion of their business was over barge-rail routes. Except for the handling of Government-controlled corn shipped at export rates (which are lower than those in issue), these elevators were relegated, for the most part, to such operation as was necessary to process corn for retail locally, while the elevator operators took on the function of merchandisers employed at taking the corn off the farmers' hands and marketing it at the river. After the proposed rate went into effect, this pattern was changed. Elevators on the Belt discontinued their merchandising business with the subterminal river elevators and returned to their former role as rail elevators.

Of the elevators closer to the Belt than to the river, but which had no facilities on the New York Central, some set up portable equipment on the Belt, while others experienced reductions and face possible elimination of their business in corn for river shipment. This is to be expected in making the all-rail route competitive with the barge-rail route.

Some diversion of traffic must necessarily result in redeveloping a rail movement of corn from the area contiguous to the rail line, and to that extent the barge movement and the business of those connected therewith will be adversely affected. An example of how the competitive situation was altered is seen in the case of the country elevator at Grand Ridge, Ill., which lost some business from farms located between it and the Belt elevator at Streator, 8 miles to the south, but lost no business from farms lying between it and the river elevator at Ottawa, 8 miles to the north. Another country elevator operator at Marseilles, Ill., north of the river, felt no adverse effects from the operation of the proposed rates, notwithstanding that his area of business extends south of the river to within 6 miles of the Belt. Even though he lost some customers, he gained others. It is interesting to note that though this operator was located on a line of the Chicago, Rock Island and Pacific Railroad Company, he had no facilities for rail loading because, as he related, there is no incentive to ship by rail, the river rate being what it is.

At the same time the 10 competitive river ports, notwithstanding their loss of traffic to the Belt, increased their shipments of corn to Chicago from 402,105 tons in the period December 15, 1955, to August 30, 1956, to 493,668 tons in the corresponding period the following year, during which time the proposed rates were in effect. It is apparent that while corn grown adjacent to the Belt was attracted to the rails, that grown adjacent to the river remained with the barges. Thus, it is evident that the proposed rates are not lower than necessary to meet the barge competition.

The rate and revenue comparisons and cost-saving evidence submitted by the New York Central and its supporters establish the compensativeness of the proposed rates.

We find, upon the record herein, that applicants have shown a special case within the meaning of section 4 of the act, by virtue of actual and compelling competition; that the proposed rates are not lower than necessary to meet that competition, do not constitute a destructive competitive practice, are reasonably compensatory, and will not impose an undue burden on other traffic; and that the relief sought would not be disharmonious with the other provisions of the act, would be in the public interest, and is justified.

A fourth-section order granting the relief sought will be entered.

310 I.C.C.

U.S. GOVERNMENT PRINTING OFFICE: 1960

APPENDIX D.

Fourth Section Order No. 19346

ORDER.

At a Session of the Interstate Commerce Commission, Division 2, held at its office in Washington, D. C., on the 8th day of June, A. D. 1960.

CORN AND CORN PRODUCTS, ILLINOIS TO OFFICIAL TERRITORY.

By fourth-section application No. 33955, as amended, carriers parties to the New York Central Railroad Company tariff L. C. C. No. 1169 and Agent H. R. Hinsch's tariff I. C. C. Nos. 4403 and 4499, according as they may participate in the traffic, apply for authority to continue or to establish and maintain the rates hereinafter described without observing the long-and-short-haul provision of Section 4 of the Interstate Commerce Act. A hearing having been held, and full investigation of the matters and things involved in said application having been made, and the division, on the date hereof, having been made and filed a report containing its findings of fact and conclusions thereon, which application and report are hereby referred to and made a part hereof:

It is ordered, That applicants in No. 33955, as amended, be, and they are hereby, authorized to continue or to establish and maintain over their proposed direct routes, for the transportation of corn products, in carloads, as more fully described in the application, from points in Illinois on that part of the New York Central Railroad Company's Kankakee Belt Line extending from Van's Siding to Moronts, both inclusive, to points in central,

trunk-line, and New England territories, rates constructed on the basis described in the application, and to maintain higher rates from and to intermediate points; Provided, That the rates from and to such higher-rated intermediate points shall not be increased except as may be authorized by this Commission nor exceed the lowest combination of rates subject to the Interstate Commerce Act.

It is further ordered, That all other and further relief prayed by fourth-section application No. 33955, as amended, be, and it is hereby, denied.

The Commission does not hereby approve any rates filed under this authority, all such rates being subject to complaint, investigation, and correction if in conflict with any provision of the Interstate Commerce Act.

By the Commission, division 2.

Harold D. McCoy,
Secretary.

(Seal)

APPENDIX E.

INTERSTATE COMMERCE COMMISSION

FOURTH SECTION APPLICATION NO. 33955 CORN AND CORN PRODUCTS, ILLINOIS TO OFFICIAL TERRITORY

Decided .....

Authority to establish and maintain an all-rail proportional rate on corn and corn products to Kankakee, Ill., from origins on the line of the New York Central Railroad Company, Moronts to Van's Siding, Ill., inclusive, without observing the long-and-short-haul provision of section 4 of the Interstate Commerce Act, denied.

Richard J. Murphy, William C. Leiper, and Daniel J. Sweeney for applicants.

Freeman Bradford and A. C. Shier for interveners in support of the application.

Edward B. Hayes, Wilbur S. Legge, Nael D. Belnap, Harold E. Spencer, Richard J. Hardy, Richard M. Freeman, James V. Springrose, Lawrence Farlow, James C. Scott, I. M. Funk, Ronald E. Tallyn, E. S. Herron, R. D. Erickson, and J. S. Chartrand for protestants.

REPORT PROPOSED BY GEORGE A. DAHAN, HEARING EXAMINER.

By application, as amended, railroads parties to New York Central Railroad Company's tariff I.C.C. No. 1169

and Agent H. R. Hinsch's tariffs I.C.C. Nos. 4403 and 4499, apply for authority to establish and maintain an all-rail proportional rate of 5.5 cents,[1] on corn and corn products, minimum 100,000 pounds, from northern Illinois origins on that part of New York Central's Kankakee Belt Line extending eastward from Moronts to Van's Siding, Ill., to Kankakee, Ill., applicable only on milled-in-transit traffic destined ultimately to points in central, trunk line, and New England territories at present proportional or reshipping rates from Kankakee to final destination, without observing the long-and-short-haul provision of the Interstate Commerce Act.

(Sheet 2)

Effective December 15, 1956, the New York Central established over its line direct a proportional rate of 5 cents (subsequently increased to 5.5 cents under Ex Parte 206), on corn and corn products, minimum 100,000 pounds, from the Kankakee Belt origins to Kankakee, restricted to apply on traffic milled-in-transit destined to points at the western termini of eastern trunk lines and points east thereof. At the same time, the through single-factor rates from these origins to final destination were restricted so as not to apply when the combination of the proportional rate to Kankakee and the reshipping rate from Kankakee to final destination is lower. The proportional rate to Kankakee became effective without protest. It was established in the belief that outstanding fourth section orders in connection with the reshipping rates from Kankakee afforded ample relief to cover departures which occurred. Subsequently, applicants learned that restriction of the rate to destinations at the western termini of eastern trunk lines and east thereof created departures at desti-

[1] Rates are stated in amounts per 100 pounds, include the increase under Ex Parte 206 unless otherwise indicated, and are subject to the increase under Ex Parte 212.

nations in central territory not authorized by the outstanding orders. Additionally, unauthorized origin departures were also created at Kankakee and other origins north, south, and east thereof, because the combination of proportional rates to and from Kankakee resulted in lower per-car charges than those in connection with the application of the flat or local rates from Kankakee and other intermediate origins. To eliminate the unauthorized destination departures, the 5.5-cents proportional rate to Kankakee was extended to apply on the same traffic (Sheet 3).
destined ultimately to points in central territory effective July 30, 1957, postponed to August 29, 1957. And the instant application was filed for authority to maintain the origin departures resulting from the adjustments effective December 15, 1956 and August 29, 1957. On August 27, 1957, the Commission granted the relief sought temporarily pending final determination of the matter herein. On August 28, 1957, certain protestants brought a court action to set aside the temporary order of the Commission and to enjoin the use of the rates without fourth-section relief. A temporary restraining order was issued on August 28, 1957, making the reduced rate combinations over Kankakee inoperative until November 28, 1957, when the court order was vacated and the court action dismissed. The reduced rate has been in effect since November 28, 1957.

Historically, the rail rates on grain and grain products from northern Illinois to eastern destinations were combination rates over Chicago, Ill., and later when single-factor rates were established they were made equal to the combinations. From 1907 to 1921, the rates on grain products ranged from the same to one cent higher than the rates on grain. Since 1921, the rates on grain products have been uniformly .5-cent higher than those on

grain. This differential holds true in respect of the reshipping rates as well as the flat rates. The same reshipping rates apply from both Chicago and Kankakee.

The reduced proportional rate, also herein referred to as the proposed rate, to Kankakee, in connection with the reshipping rates from Kankakee, to eastern destinations, (Sheet 4)
is to meet the competition of the barge-rail combination rates over Chicago made up of the local barge rates to Chicago and the same rail reshipping rates to eastern destinations. The local barge rates from 10 Illinois River ports[2] to Chicago ranged from 3.5 to 6 cents on December 5, 1957, and effective December 6, 1957, they range from 3.65 to 6.25 cents. There is no milling-in-transit requirement for the application of the barge-rail combination rates.

In arriving at the original 5-cent proportional rate the weighted average barge rate of 4.625 cents on the barge movement for the period December 16, 1956 to November 11, 1957, from the 10 ports to Chicago was considered as the competitive rate. On the same movement the weighted average barge rate would be 4.825 cents effective December 6, 1957. Including increases under Ex Parte 212, the proportional or proposed rate is 6 cents. This rate has application only in connection with the reshipping rates on grain products insofar as they apply on certain corn products. In the first instance the flat rates on grain from the Kankakee Belt origins to Kankakee and other transit points in official territory is applied on corn. After milling-in-transit at Kankakee or other transit points and reshipment of corn products, the inbound charges are readjusted on the basis of the propor-

[2] Lockport, Joliet, Morris, Seneca, Ottawa, La Salle, Spring Valley, Hennepin, Henry, and Lacon, Ill.

tional rate on corn to Kankakee and the reshipping rates on grain products from Kankakee and applied to the outbound movement of corn products. The local rates initially charged to Kankakee or other transit points apply on the weight of the shrinkage or manufacturing loss.

(Sheet 5)

The Kankakee Belt Line west of Kankakee roughly parallels, the Illinois River in northern Illinois. Moronts is on the river about 4 miles from the nearest river port of Spring Valley, Ill., and Van's Siding which is the most distant point from the river is about 32 miles south of its nearest port of Joliet, Ill. The northern Illinois territory produces a surplus of corn. Historically, this corn moved over all-rail routes to eastern destinations. The development of commerce on the Illinois River about 20 years ago started a diversion of the all-rail movement to barge-rail routes extending from river ports to Chicago, Ill., by barge, and thence to eastern destinations by rail. In 1935, 1940, and 1957, respectively, about 1.5, 19, and 59 million bushels of grain, including .7, 16, and 34 million bushels of corn, moved by barge from all Illinois River ports to Chicago. The bulk of the corn movement by barge originates at the 10 river ports which range from 4 to 36 highway miles from the Kankakee Belt origins. The source of the corn are farms ranging up to 40 miles from the ports.

The primary business available to the New York Central at the origin points is grain, predominately corn, traffic. During 1954, 1955, and 1956, respectively, 467, 729, and 615 carloads of grain, including 305, 533, and 464 carloads of corn originated at the origin points. Most of this rail movement consisted of Commodity Credit Corporation corn[3] which is usually shipped by rail, and is not subject

[3] Corn under Government control.

to the same competitive forces as "free" corn[4]. For the (Sheet 6)
6-, 8-, and 12-month periods ended June 30, August 31, and December 31, 1957, respectively, 1,915, 2,411, and 2,681 carloads of corn originated at the Kankakee Belt origins.

The 1956 corn crop in the area was somewhat heavier than the 1955 corp. This accounted for a heavier movement in 1957. During the period December 15, 1956 to August 30, 1957, when the reduced rate was in effect the corn movement by barge from the 10 river ports to Chicago amounted to 493,668 tons, including 387,256 tons by protestant A. L. Mechling Lines, Inc.[5] In the corresponding period one year earlier this movement totaled 402,105 tons of which 375,922 tons moved by Mechling. The two ports (Lockport and Joliet) nearest to Chicago are the most distant ports to the Kankakee Belt origins and the barge movement from these ports are not affected by the reduced rate to the same extent as the other ports. Also, from the three ports (Hennepin, Henry and Lacon) south of Moronts the great majority of Mechling's corn business moved to the south in 1956 and to Chicago (north) in 1957. From the five ports primarily affected, Mechling's barge movement to Chicago was lower by 22,928 tons in the period December 15, 1956 to August 28, 1957, than during the corresponding period one year earlier.

Cargill Incorporated, Illinois Grain Corporation, Norris Grain Corporation, W. W. Dewey Company, and Glidden Company, operate sub-terminal elevators at one or more of the ports. Cargill's corn purchases at three elevators from the area south of the river dropped from 1,632,092

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[4] Corn available on the open market.

[5] Includes Mechling's wholly-owned subsidiary, Marine Transit Company.

(Sheet 7)
bushels in the period December 15, 1955 to August 31, 1956, to 1,171,329 bushels in the corresponding period one year later. From the same area Illinois Grain purchased 854,326 and 365,005 bushels during the first 8 months of 1956 and 1957, respectively. Norris experienced purchase declines in 1957 under 1956 at three elevators. The decline at the one elevator most affected amounted to 646,380 bushels in the first 6 months of 1957 under the first 6 months of 1956. Dewey's purchases from four points in the Kankakee Belt were reduced from 120,000 bushels in the first 8 months of 1956 to 15,000 bushels in the same period of 1957. Glidden's elevators were opened in the fall of 1956. Its limited experience indicates a decline in purchases in the area subsequent to the effectiveness of the proposed rate.

The river sub-terminal elevators are intermediate between the terminal elevators in Chicago and the country elevators in northern Illinois. The sub-terminal elevators are generally operated by the terminal elevators and were established for the accumulation of corn for river movement. With the exception of Dewey which operates both a sub-terminal elevator and a country elevator, this accumulation of corn is through purchase from the country elevators rather than from the farmers. Originally the country elevators sold the corn to merchants or brokers for rail delivery to processors. And their facilities were designed to receive grain from farm wagons and trucks, assemble the grain in carload lots, and load it into rail cars. The advent of river transportation and the establishment of sub-terminal elevators brought about another outlet for the corn gathered by the country elevators.
(Sheet 8)
For its service, the country elevator realizes from 1.5 to 4 cents a bushel. There is little, if any, difference in the country elevator's margin in its sales to buyers for barge or rail movement.

The transportation of corn from the farms to the country elevators is performed in the farmer's own trucks. The corn sold to the river sub-terminal elevators is transported in for-hire trucks either directly from the farms or to a somewhat lesser extent from the country elevators. There is a small variation in the for-hire truck charge depending upon whether the movements are directly from the farms or from the country elevators. Such charges are based upon distances and are filed and fixed by the Illinois Commerce Commission. They range from 2 to 4 cents a bushel for distances ranging up to 30 miles from elevator to elevator and up to 20 miles from farm to elevator.

The country elevators in a corn producing area base their bids to the farmers on the price at the most advantageous terminal market less transportation costs. Prior to the proposed rate, all the free corn sales of the three supporting country elevators on the Kankakee Belt were made to the sub-terminal river elevators because corn for river transportation commanded higher prices than corn for rail transportation. The higher prices were attributed to the ability of the river sub-terminal elevators to market the corn at lower transportation costs over the barge-rail routes than rail buyers over the all-rail routes. Since the effectiveness of the proposed rates, it became more profitable for these country elevators to ship by

(Sheet 9)

railroad and the farmers benefited by the competitive bidding. Despite their ability to pass on to the farmers the advantage of competitive bids, these country elevators assert that the amount of their business has not increased. Several country elevators with rail facilities from 3 to 11 miles from the Belt have established portable loaders on the Belt.

Of the 11 opposing country elevators, eight are located between the Illinois River and the Kankakee Belt, two are south of the Belt, and one north of the river. The last is on the river and it not served by rail. Although it purchases corn from farmers located as much as 18 miles south of the river or within six miles of the Belt, its business has not been affected by the proposed rate, but its customers south of the river have "been looking toward that rate (proposed rate) pretty strong." The 10 other country elevators are served by rail lines other than the Belt, and have been adversely affected by the proposed rate. The majority have lost business. Most seriously affected was one located at the same point as an elevator served by the Belt. Its business exceeded 252,000 bushels in each of the years 1955 and 1956, but shipped only 31,000 bushels in 1957* and nothing in January 1958. In addition to a decline in business, 1957 under 1956, one of these elevators shipped a portion of its 1957 business through an elevator on the Belt at a cost of over half its commission on such sales. While the total business of one elevator increased 1957 over 1956, its rail shipments declined from 258 carloads in 1956 to 78 carloads in 1957, (Sheet 10)
representing a reduction in rail shipments of about 324,000 bushels. And one elevator believed that the proposed rate would be a temporary situation, and to retain its farmer customers it absorbed the difference, amounting to $1,800, between bids on corn in rail cars at competitive Belt elevators and bids in cars at its elevator.

The proposed rate has enabled the Belt elevators to outbid by as much as 4 cents a bushel other elevators in the same area, thus disturbing the prior equitable competitive relationship among the country elevators. On

*The effectiveness of the proposed rate was enjoined from August 28, 1957 to November 28, 1957.

January 30, 1958, the prices bid for corn per bushel were $1.09 in car as Missal, Ill., on the Belt, $1.04⅞ in car at Kernan, Ill., on another railroad, and $1.075 in truck at the river. One Belt elevator has advertised in the local papers of certain points served by other railroads that it has lower freight rates and calls upon the corn producers to see it for a better price. The opposing country elevators are apprehensive of further inroad of their business as their farmer customers became aware of the higher prices for corn in car on the Belt.

The Farmers Grain Dealers Association of Illinois and the Illinois Grain Dealer's Association, each of which has a membership of approximately 300 country elevators with facilities at about 400 rail stations in Illinois, ask for the restoration of the fair competitive position among their members. It is their position that the rate from one station on one railroad must be competitive with the rate from another station on another railroad; that such rail rates should be competitive with other modes of transportation; and that such fourth-section relief as may be

(Sheet 11)

necessary should be granted to enable the railroads to compete with the Illinois River barge lines.

Opposed to any fourth-section relief, is the Indiana Farm Bureau Cooperative Association, a federated cooperative of about 86 associations with a total membership, mostly farmers, of about 160,000. This association is a member of both the Board of Trade of the City of Chicago and the Indianapolis Board of Trade, Inc., and operates a 5.5 million bushel elevator located on the New York Central at Indianapolis, Ind., and a 2.5 million bushel elevator in Louisville, Ky. It handles about 50 million bushels of grain annually, about half of which is corn, including a large part which is marketed in official territory. Among the 150 to 200 Indiana shipping points

of its member producers are stations on the New York Central from which the rates on milled-in-transit corn to eastern destinations are as much as 10 cents higher than the combination of the proposed rate and the reshipping rates. Since the eastern market price is the same to both the Indiana and Illinois producers, its members must absorb the difference in transportation costs despite the fact that they are less distant and intermediate to the markets, from the Kankakee Belt. This association has not been too concerned about the barge-rail combination rates.

In its study of the competitive situation, the New York Central made inquiries of corn processors at Kankakee, Paris, and Danville, Ill., and Indianapolis, Ind., as well as country elevators on the Belt. Three of the processors, General Foods Corporation at Kankakee, Illinois Cereal Mills at Paris, and Evans Milling Company at Indian-

(Sheet 12)

apolis, support the proposed rate. Until the effectiveness of the proposed rate the corn purchases of General Foods in the northern Illinois territory for rail delivery amounted to about 1.5 carloads a week. After the proposed rate became effective, it received 1,101 carloads during the first 8 months of 1957. In the same period, Illinois Cereal and Evans Milling received 327 and 219 carloads, respectively, from Belt origins. Immediately prior to 1957, Illinois Cereal received only two carloads in 3 years, and Evans Milling did not receive any cars in 15 years, from Belt origins. Of the 1,915 cars of corn which originated in the Belt during the first 6 months of 1957, 1,326 cars, reflecting 70 percent of the total, were destined to Kankakee, Indianapolis, Paris, and Danville, and 548 cars were destined to Chicago. Practically all, if not all, the 1,326 cars consisted of free corn on which the proposed rate would apply, whereas only 31 of the 548 cars to Chicago

were free corn. The remainder, 517 cars, to Chicago were Commodity Credit Corporation corn on which the proposed rate would have no application. From the Belt origins to Chicago, the free corn movement aggregated 270 carloads in the 12-month period ended October 30, 1956, and 45 cars in the same period a year later.

According to General Foods, the proposed rate has enabled rail buyers to bid for corn in the country market in competition with river buyers, but a difference in the price to the farmer still exists in favor of the river sub-terminal elevators It computes differences of 9.28 and .63 cents a bushel before and after the effectiveness of the proposed rate, respectively. To determine the prices to the farmer at the river elevator at Morris, Ill., (Sheet 13)
and at the country elevator at Blair, Ill., it used a Chicago market price of $1.15 a bushel, from which it subtracted costs of 14.32 cents[7] a bushel on rail originations prior to the proposed rate leaving a price to the farmer at the country elevator of $1.0068 a bushel; 5.67 cents[8] a bushel on rail originations since the effectiveness of the proposed rate leaving a price to the farmer at the country elevator of $1.0933 a bushel; and 5.04 cents[9] a bushel on river

[7] Reflects the proportional rail rate from Blair to Chicago of 20.5 cents and 3 percent tax converted to 11.82 cents a bushel plus country elevator handling of 2.5 cents a bushel.

[8] Reflects the proposed rate from Blair to Kankakee of 5.5 cents and 3 percent federal tax converted to 3.17 cents a bushel, plus country elevator handling of 2.5 cents a bushel.

[9] Reflects the barge rate from Morris to Chicago of 4.4 cents and 3 percent federal tax converted to 2.54 cents a bushel, plus elevation at river of 1.5 cents a bushel (2.68 cents per 100 pounds) and country elevator mark-up of 1 cent a bushel.

originations leaving a price to the farmer at the river elevator of $1.0996 a bushel. The different of .63 cents in favor of barge bids does not appear to be representative. A bid as little as .5-cent higher would succeed. It is doubtful that the Belt elevators would shift their sales from river buyers to General Foods when the bid at the river is .63 higher Based on the actual daily bids at five Belt points, and five river points during the 7-month period ended July 31, 1957, the Belt bids averaged 2.02 cents a bushel higher than the river bids. Although the record indicates that differences in moisture discount scales are reflected by different levels in bids so that (Sheet 14)
the actual price of corn would be about equal, and that the bids of General Foods and those of the Chicago market were on moisture discounts of 1 and 1.5 cents a bushel, respectively, for each .5 percent of moisture from 15.5 to 23 percent, there is no evidence that the compared actual bids at the river and at the Belt were at different scales so as to require an adjustment in the determination of a difference between such bids. If the actual bids were on such different discount scales, then the difference would favor the Belt by an additional 3 to 4.5 cents a bushel.

(Sheet 15)

General Foods, as well as the New York Central, would offset the costs of trucking from farm or country elevator to the river elevator on barge movements with trucking from farm to country elevators on rail movements on the grounds that since the farmer bears the trucking costs from farm to either the river sub-terminal elevator or the Belt country elevator, the same expense would be incurred in movements from the farm to equi-distant river elevators and country elevators. But this ignores the movement from country elevator to river elevator of corn which previously moved from farm to country elevator, the relative location of the river elevator which

ranges up to 40 miles from the farms and the country elevator which is generally within 6 miles of the farms, the use of for-hire trucks in farm to river elevator movement as contrasted with farmer wagon or truck carriage in farm to country elevator movement, and applicants propose to place shippers on the Belt in a position to compete with the barge lines. The truck charge from the shipper location to the river is a factor which must be considered. At the same time the trucking directly from farm to river elevator of the major part of the river movements avoids certain private carriage which is of some expense to the farmer and should not be completely ignored.

(Sheet 16)

Cargill, Illinois Grain, and Glidden, compares barge shipper costs of 18.5,[10] 17.7,[11] and 18 cents[12] per 100 pounds, respectively with the proposed rate of 5.5 cents, and point out that these barge costs make no provision for insurance, shipper preference for country run unmixed corn, and the usual water carrier disabilities, such as

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[10] Includes trucking from Missal, Ill., country elevator to Ottawa, Ill., river elevator of 5.36 cents, transfer truck to barge of 2.68 cents, barge rate Ottawa to Chicago of 4.95 cents, stevedoring at Chicago of 1.15 cents, transfer barge to rail at Chicago of 4.01 cents, and outbound inspection of .45 cents.

[11] Includes trucking from Dwight, Ill., country elevator to Morris, Ill., river elevator of 5.4 cents, transfer truck to barge of 2.7 cents, barge rate Morris to Chicago of 4.4 cents, and stevedoring and transfer barge to rail at Chicago of 5.2 cents.

[12] Includes nominal trucking from country elevator to Seneca, Ill., river elevator of 3 cents a bushel, transfer truck to barge of 1.5 cents a bushel, barge rate Seneca to Chicago of 2.63 cents a bushel, stevedoring at Chicago of .75 cents a bushel, and transfer barge to rail at Chicago of 2.25 cents a bushel, a total of 10.13 cents a bushel of 18 cents per 100 pounds.

dependency on weather and added handling. Since the proposed rate applies in connection with the reshipping rates to the east, the barge costs must include all items necessary to place barge and rail shipments in the same position. In purchases of corn from the country elevator, the river sub-terminal elevator does not know whether shipment, in whole or in part, will be made from the country elevator or directly from the farm. Its bid to the country elevator is predicated upon shipment from the country elevator. In the circumstances, these river elevators include the trucking expenses from country elevator to river elevator in their comparisons. They exclude expenses for trucking from farm to country elevator, country elevator margin for its service, and in-

(Sheet 17)

bound inspection, which are the same in both barge and rail shipments. In respect of the country elevator margin, their view coincides with the evidence of the country elevators as contrasted with the comparison of General Foods which appears to understate the country elevator mark-up on barge shipments. To place a barge shipment in the same position as a rail shipment at the proposed rate, the shipper incurs expenses for the services of elevation or transfer from truck to barge and from barge to rail, trimming or stevedoring, and outbound inspection, which services are not required in rail shipment. A so-called trimming in the loading of a rail car is a part of the usual loading operation and entirely different than the trimming or stevedoring a barge. Nor may the fact that Evans Milling purchased about 25 percent of its corn from an Indianapolis terminal elevator, thus requiring an intermediate elevation, be considered as comparable to the elevation or transfer from barge to rail which is necessary on all barge corn to Chicago.

The Board of Trade of the City of Chicago is of the opinion that the proposed rate is too low, and it seriously doubts that a rate of 18 cents based upon barge movement costs to the shipper submitted by the river elevators, would enable applicants to meet the barge competition. Its knowledge of the respective barge and rail services costs to the shipper is limited. But since the price is a controlling factor in the shipper selection of the transportation mode, it believes that an equitable basis would be one predicated upon the pricing of the corn at the river elevator and on the Belt. Based upon the average (Sheet 18)
difference of 2 cents a bushel in the rail corn bid on the Belt over the barge corn bid at the river and the trucking charges ranging from 2 to 4 cents a bushel from country elevators to river elevators, the proposed rate, according to the Chicago Board of Trade, would be lower than necessary to meet barge competition by amounts of 7, 8, 9, 10, and 10.5 cents per 100 pounds from Belt points in the 2, 2.5, 3, 3.5, and 4 cents a bushel trucking zones, respectively. The Belt and river average bids for the 7-month period ended July 31, 1957, would be approximately the same, differing only from .02 to .2 cents a bushel, by subtracting the amounts believed necessary to meet barge competition from the Belt bids and the trucking charges from the river bids. The proposed rate adjusted by increases, from 7 to 10.5 cents depending upon the trucking zone would produce rates ranging from 12.5 to 16 cents; the 12.5-cent adjusted rate would apply from Belt points nearest the river and most affected by barge competition, but most distant to Kankakee, and the 16-cent adjusted rate would apply from points most distant to the river and least affected by the competition, but nearest to Kankakee. Both the simple average of 46.4 miles and weighted average distance of 38.3 miles

based upon the corn movement on the Belt during the first 6 months of 1957, from the Belt points to Kankakee, are in the 3 cents a bushel trucking zone. The adjusted rate from Belt points in that zone is 14.5 cents, and the Chicago Board of Trade is of the opinion that the Belt points should be blanketed with this rate because the points are so treated now, and the river prices at the (Sheet 19)
most competitive river elevators, Spring Valley to Morris, are blanketed.

Applicants submitted no cost data, and the New York Central relies on certain comparative earnings, rate levels, and operating conditions as indicative of the compensativeness of the proposed rate. Based upon the minimum weight and the weighted average distance of 38.3 miles, the proposed rate would yield $55 per car, $1.436 per car-mile, and 2817 mills per ton-mile. These earnings are compared with earnings of $60 per car, $1.017 per car-mile, and 20.3 mills per ton-mile which would be produced by a rail rate on corn, minimum 100,000 pounds, from Winsted, Minn., to Port Cargill, Minn., 59 miles. The compared rate, however, is an intrastate rate scheduled to expire on December 5, 1958, and the local interstate rate is higher.

During the 8 months period ended August 31, 1957, the corn and corn products movement of General Foods yielded average revenues of $66.07 per car, 110,076 pounds; and $1.685 per car-mile for 39.21 miles, from Belt origins to Kankakee; $403.33 per car, 81,775 pounds, and 47.7 cents per car-mile for 845.7 miles, from Kankakee to eastern destinations; and $[illegible]8.42 per car and 50.69 cents per car-mile for 884.7 miles, from Belt origins to eastern destinations. In the same period the movement of Evans Milling yielded average revenues of $59.42 per car, 109,137 pounds, and $2.38 per car-mile for 24.95 miles,

from Belt origins to Kankakee; and $407.38 per car, and 61.62 cents per car-mile from Belt origins to eastern destinations, including Ohio, via Kankakee and Indianapolis. The proposed rates in connection with the re- (Sheet 20)
shipping rates did not apply to Ohio destinations during the period, and excluding such shipments, the car-mile earnings averaged 51.09 cents. For 1955, the average revenues of the New York Central were 40.015 cents per car-mile for its average haul of 236.58 miles. In 1956, the average railroad revenue from corn was 95 cents per short-line car-mile. Actual distances would produce lower earnings, but in many instances actual mileages are very close to short-line mileages.

The combination of the proposed rate and the reshipping rates from Belt origins to eastern destinations via Kankakee, and the same reshipping rates from Chicago to eastern destinations, reflect averages of 14.4 and 13.1 percent, respectively, of the Docket 28300 first-class. On ex-lake grain, from Buffalo and Oswego, N. Y., and Erie, Pa., to tidewater ports, applicants maintain export proportional rates which range from 6.3 to 9.5 percent of the Docket 28300 first-class. Also, from certain Belt origins to New York City and Boston, Mass., applicants maintain export rates on grain which are lower than the combination of proportionals over Kankakee. For example, from Dwight, the combination rates are 59.5 and 61.5 cents to New York City and Boston, respectively, and the export rate is 54.5 cents to both ports. The proposed rate at issue however is a short-haul gathering rate on domestic traffic.

The operating distance of the New York Central from Chicago to Kankakee is 75 miles compared with the weighted average distance of 38.3 miles from Belt points to Kankakee. The aggregate distances from Belt points

to Kankakee, via truck to the river, thence barge to
(Sheet 21)
Chicago, and thence the New York Central to Kankakee exceeded by 133 to 797 percent the distance from Belt points to Kankakee, and to certain eastern destinations. The distances from Chicago via Kankakee exceed by 3.73 to 20.61 percent the distances from Belt points, via Kankakee. The line of another applicant, Illinois Central Railroad, from Chicago to Kankakee is more direct than that of the New York Central, and the combination of the proposed rate and reshipping rates applied from Belt points to eastern destinations via Kankakee and Chicago.

The switching of loaded and empty grain cars from and to terminal elevators at Chicago for the transportation of corn to Kankakee, Indianapolis, Paris, and Danville by the New York Central is somewhat more complex than its handling of cars at Belt origins for movement to the same destinations. The more complex handling forms the primary basis for the opinion of the New York Central's operating witness that the handling of corn from Belt origins is less expensive than from Chicago. This witness, however, has never made a cost study, and could give no idea as to the extent one handling is more expensive than the other. In addition, no consideration was given to service factors, such as expense of freight agents at Belt origins which is chargeable solely to grain traffic, since grain is the only movement at most of the points.

The New York Central assumes that prior to the proposed rate corn grown on farms adjacent to its lines was trucked to the river, barged to Chicago at which it was purchased by General Foods and shipped over its lines to Kankakee where it was transitted and the product

(Sheet 22)
shipped to eastern destinations over its lines. For its haul from Chicago to Kankakee the billing rate was assessed which upon transit was credited to the Chicago reshipping rate which applies via Kankakee. And it was required to absorb switching charges averaging 2 cents per 100 pounds at Chicago on corn it transported to Kankakee, Indianapolis, Paris and Danville. At the proposed rate, it receives after transit the amount of the proposed rate, 5.5 cents, for its haul from Belt origins to Kankakee, and avoids the Chicago switching absorption. It asserts that it is benefited in the amount of 7.5 cents per 100 pounds by handling traffic at the proposed rate over its previous handling. The average switching absorption is based upon 312 carloads of corn from Chicago terminal elevators on connecting rail lines to General Foods at Kankakee during April, May and June 1956. A substantial portion of this switching was performed by railroads in which the New York Central has a proprietary interest. Although the New York Central representative testified that the "majority" of the corn from Chicago to Kankakee was backed by ex-barge billing "because I have looked at those bills," he was unable to further detail the extent of the Chicago to Kankakee movement backed by ex-barge billing. The policy of General Foods is to buy corn with ex-rail billing behind it, if possible, and it purchases Chicago elevator corn only when it cannot meet its requirements with country-run corn. In 1956, Cargill sold General Foods 410,000 bushels of corn from its Chicago elevator and 295,000 bushels off the rail track at Chicago. All this corn has ex-rail billing behind it.

(Sheet 23)
The protestants submitted a study of the system average costs[12] of the New York Central and the territorial

[12] Based upon the application of cost formula Rail Form A of the Commission's Section of Cost Finding.

average costs[14] of the eastern district railroads. On the average 55-ton load, the out-of-pocket costs of the New York Central and the eastern district railroads are 8.56 and 8.57 cents per 100 pounds, respectively, for the weighted average distance of 38.3 miles. On minimum loads of 50-tons and for the simple average distance of 46.4 miles, the out-of-pocket costs range up to 9.66 cents per 100 pounds. These average costs are refined to reflect identifiable service characteristics of the traffic, viz: Type of car; net weight of load; way train gross ton-mile costs; length of haul; empty return; and a part of the spiral service costs.

The average costs are susceptible to greater refinement, but this is solely within the competence of the New York Central, and there is indication of record that the average costs tend to understate the costs of handling corn traffic on the Belt. On brief, the New York Central contends that the method of applying the cost formula results in a gross overstatement of its costs. To support its contention it readjusts the terminal switching and freight train car costs and arrives at an out-of pocket costs of 6.9 cents per 100 pounds on 55-ton loads for 38.3 miles. The readjusted terminal switching costs are related to the size of the Belt points based upon Statement 4-54 of the Commission's Cost Finding Section, (Sheet 24)
and the readjusted freight-train car costs reflect an origin operation of one car day. But Statement 4-54 is not of record, and there is evidence from recent cost studies of the eastern railroads that the cost of handling of grain in the territory is somewhat higher than the territorial average. Even if the readjustment was valid and

[14] From Section of Cost Finding Section Statement No. 1-57 which is based upon the application of Rail Form A to expenses of eastern district railroads as a group, and adjusted to reflect current levels.

accepted, the proposed rate would still be somewhat less than the readjusted costs.

For 1956, Mechling's operating ratio was 91.9 percent, and its average fully distributed costs for the transportation of corn from the six most competitive ports to Chicago was 11.4 mills and 87.93 cents per ton or 4.4 cents per 100 pounds. These expenses are about 10 cents less than the New York Central's average fully distributed costs of 14.33 and 13.57 per 100 pounds on 50-ton and 55-ton loads, respectively, for 46.4 miles, computed by protestants. According to Mechling this difference of approximately 10 cents represents its inherent low cost advantage which must be preserved.

The Chicago Board of Trade raises certain issues, principally discrimination against whole corn by the milling-in-transit limitation; discrimination against Chicago by the proposed-rate combination applying over Kankakee when prior thereto rate to the East were made over Chicago; undue preference to the processors of corn by the limitations in the application of the proposed rate to commodities shipped by these processors; and unreasonable routes on the proposed rate combination by the restrictive routes which apply over Kankakee in

(Sheet 25)

movements to eastern destinations. Although the New York Central intends to remove the milling-in-transit limitation, these issues do not directly deal with the fourth-section principles here involved, but are properly matters which may be raised in investigation or complaint proceedings. And in view of the conclusions herein, they need not be further considered.

It is clear that the competitive situation which prevailed prior to the proposed rate between the all-rail and the barge-rail rates on corn from the northern Illinois territory to the East required an adjustment in the all-

rail rates, and that such an adjustment requires fourth-section relief. The proposed rate is purportedly aimed to partly remedy the situation, and the instant application seeks the relief to cover the departures which occur. Before such relief may be granted, applicants must show that the proposed rate is reasonably compensatory and no lower than necessary to meet the competition. That they have not done so is crystal clear.

The Indiana Farm Bureau Cooperative has not been concerned with the barge-rail combination rates, and it is reasonable to assume that its attitude toward the proposed-rate combinations would have been the same if those combinations were no lower than the barge-rail combinations. Although the country elevators in the area were originally set up to do business over all-rail routes and prior to the proposed rate the preponderant portion of their business was over barge-rail routes, there existed an equality of competitive opportunity between these

(Sheet 26)

elevators. The proposed rate disrupted this competitive equality. After the proposed rate, the Belt elevators discontinued their business with the sub-terminal river elevators and the competitive country elevators incurred substantial losses in, and face an elimination of, their business. This, despite the limitations in the application of the proposed-rate combinations. I do not believe that the business changes would have been so drastic if the proposed-rate combinations were no lower than the barge-rail rate combinations. The river elevators would not have been eliminated from doing business with the Belt elevators, and the competitive country elevators would have been better able to hold on to their farmer customers with little if any, injury to their business with the river elevators. The placing of the all-rail routes on a competitive level with the barge-rail routes would necessarily result in some diversion of traffic, but measured from the extent of the diversion at the proposed rate, it appears

that an extension of the proposed basis without a milling-in-transit limitation and with the combination made over Chicago would completely eliminate barge competition. In the final analysis, the higher rail bids for corn and the higher barge shipper costs since the effectiveness of the proposed rate are clear indications that the proposed rate is lower than necessary to meet the barge competition.

The revenue comparisons and cost saving evidence submitted by the New York Central and its supporters are insufficient to establish the compensativeness of the pro-
(Sheet 27)
posed rate. This is particularly true in the light of the cost evidence presented by protestants. Although the New York Central contends that the reduced proportional rate is compensatory in of itself and presented some evidence in that respect, it and its supporters take the position that the real issue is whether the combination of the reduced proportional rate and the reshipping rates are compensatory. To support their position they cite, principally, Lane Company, Inc. v. Louisville & Nashville Railroad Co., et al., 292 I.C.C. 76; Board of Railroad Commissioners v. Atchison, T. & S. F. Ry. Co., 34 I.C.C. 111, and Great Northern Ry. Co. v. Commodity Credit Corporation, 77 Fed. Sup. 780. But these cases are not in point. The first deals with a matter of reparation in which case the through charge must be considered. The second holds that all factors of the through rate must be considered to determine whether fourth-section relief is required. It is appropriate here only insofar as the departures are in connection with both proportional factors, there being no departures in connection with the reduced proportional rate from Moronts to Kankakee. And the third case defines a proportional rate. Here the issue concerns a separate component of through rates for the future; the lawfulness of which may be passed on

independently of the other components. Great Northern Ry. v. Sullivan, 294 I.C.C. 458; Atchison, T. & S. F. Ry. Co. v. United States, 279 U.S. 768; Cairo Board of Trade v. Cleveland, C. C. & St. L. Ry. Co., 46 I.C.C. 343; Atlantic Terra Cotta Co. v. Atlanta & W. P. R. Co., 151 I.C.C. 45. (Sheet 28)

In the absence of specific costs, the average costs, with understatements, as well as possible overstatements considered, are of sufficient probative value to determine the compensativeness of the proposed rate. The conclusion that the proposed rate will not meet the bare out-of-pocket costs is inescapable.

The Chicago Board of Trade, Farmers Grain Dealers Association, Illinois Grain Dealers Association, and certain opposing country elevators are of the opinion that a rate of 14.5 cents based upon the corn pricing situation would be reasonable. Cargill, Illinois Grain, and Indiana Farm Bureau Cooperative express the view that a rate not less than 15 cents measured by the transportation costs to the shipper, by the corn pricing situation, and by past barge and Belt rate relationships (the barge rate was from 8 to 10 cents lower than the Belt rate in 1970) can be expected to move substantial quantities of corn on the Belt. Mechling and several opposing elevators suggest as an alternative rate level for the proposed rate a rate no lower than 15.5 cents if the barge and rail modes of transportation are to remain equally competitive and the inherent low cost advantage of water transportation is to be preserved. There is merit to each of these proposals, but there are other issues raised by the Chicago Board of Trade which are not here determined which applicants should consider in any future proposal. Accordingly, the matter of a future proposal will be left to applicants.

The examiner finds that sufficient justification for the relief prayed has not been presented. The application should be denied.

APPENDIX F.

The National Transportation Policy, 49 U.S.C. Note preceding Section 1.

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act [chapters 1, 8, 12, 13, and 19 of this title], so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act [chapters 1, 8, 12, 13, and 19 of this title] shall be administered and enforced with a view to carrying out the above declaration of policy."

49 U.S.C. Sec. 1(5); 63 Stat. 485.

§ 1, par. (5). All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection there-

with, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

49 U.S.C. Sec. 3(1); 54 Stat. 902.

§ 3, par. (1). It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: Provided, however, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

49 U.S.C. Sec. 3(4); 54 Stat. 902.

§ 3, par. (4). All carriers subject to the provisions of this chapter shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term "connecting line" means the

connecting line of any carrier subject to the provisions of this chapter or any common carrier by water subject to chapter 12 of this title.

49 U.S.C. Sec. 4(1); 71 Stat. 292

§ 4, par. (1) It shall be unlawful for any common carrier subject to this chapter or chapter 12 of this title to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this chapter or chapter 12 of this title, but this shall not be construed as authorizing any common carrier within the terms of this chapter or chapter 12 of this title to charge or receive as great compensation for a shorter as for a longer distance: Provided, That upon application to the Commission and after investigation, such carrier, in special cases, may be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property, and the Commission may from time to time prescribe the extent to which such designated carriers may be relieved from the operation of the foregoing provisions of this section, but in exercising the authority conferred upon it in this proviso, the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and no such authorization shall be granted on account of merely potential water competition not actually in existence: Provided further, That any such carrier or carriers operating over a cir-

cuitous line or route may, subject only to the standards of lawfulness set forth in other provisions of this chapter or chapter 12 of this title and without further authorization, meet the charges of such carrier or carriers of the same type operating over a more direct line or route, to or from the competitive Points, provided that rates so established over circuitous routes shall not be evidence on the issue of the compensatory character of rates involved in other proceedings: And provided further, That tariffs proposing rates subject to the provision of this paragraph requiring Commission authorization may be filed when application is made to the Commission under the provisions hereof, and in the event such application is approved, the Commission shall permit such tariffs to become effective upon one day's notice.

49 U.S.C. Sec. 12(1); 62 Stat. 909.

§ 12(1) The Commission shall have authority, in order to perform the duties and carry out the objects for which it was created, to inquire into and report on the management of the business of all common carriers subject to the provisions of this chapter, and to inquire into and report on the management of the business of persons controlling, controlled by, or under a common control with, such carriers, to the extent that the business of such persons is related to the management of the business of one or more such carriers, and the Commission shall keep itself informed as to the manner and method in which the same are conducted. The Commission may obtain from such carriers and persons such information as the Commission deems necessary to carry out the provisions of this chapter; and may transmit to Congress from time to time such recommendations (including recommendations as to additional legislation) as the Commis-

sion may deem necessary. The Commission is authorized and required to execute and enforce the provisions of this chapter; and, upon the request of the Commission, it shall be the duty of any United States attorney to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions of this chapter and for the punishment of all violations thereof, and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States; and for the purposes of this chapter the Commission shall have power to require, by subpoena, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation.

49 U.S.C. Sec. 13(1); 49 Stat. 543.

§ 13, par. (1). Any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier complaining of anything done or omitted to be done by any common carrier subject to the provisions of this chapter in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the

common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

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No. 59

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

BOARD OF TRADE OF THE CITY OF CHICAGO,
Appellant,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE NEW YORK CENTRAL RAILROAD COMPANY, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

JURISDICTIONAL STATEMENT

HAROLD E. SPENCER
RICHARD M. FREEMAN
One North LaSalle Street
Chicago 2, Illinois
Counsel for Board of Trade of the City of Chicago, Appellant

J. S. CHARTRAND
141 West Jackson Blvd.
Chicago 4, Illinois

BELNAP, SPENCER, HARDY & FREEMAN
One North LaSalle Street
Chicago 2, Illinois
Of Counsel

McCORMICK & HENDERSON INC., CHICAGO, ILL.

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

JURISDICTIONAL STATEMENT

Appellant, Board of Trade of the City of Chicago (Board of Trade), an intervening plaintiff in the court below, submits this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that the question presented by the appeal is substantial and is of public importance. A separate appeal from the same judgment below is being taken by the plaintiff below, A. L. Mechling Barge Lines Inc. (Mechling) and various grain elevator operators who were also plaintiffs in the court below.

OPINIONS BELOW

The opinion of the three-judge United States District Court for the Northern District of Illinois, Eastern Division, filed September 18, 1962, is reported at 209 F. Supp. 744. A copy of the opinion is attached hereto as Appendix A. A copy of the District Court's judgment dismissing the complaint is attached as Appendix B. The report of the Interstate Commerce Commission, the validity of whose order is at issue in this case, is reported at 310 I.C.C. 437. A copy of said report is attached hereto as Appendix C. A copy of the Commission's Fourth Section Order No. 19346, entered June 8, 1960, is attached as Appendix D.

JURISDICTION

This is an action, commenced by Mechling pursuant to the provisions of 28 U.S.C. §§ 1336, 1398, 2284 and 2321-2325, inclusive, and 5 U.S.C. § 1009, to enjoin, set aside, annul and suspend a report and order of the Interstate Commerce Commission in Fourth Section Application No. 33955, *Corn and Corn Products, Illinois to Official Territory*. The Board of Trade was permitted to intervene as a party plaintiff, and to file its intervening complaint, on November 30, 1961. The judgment of the District Court dismissing the complaint was filed September 18, 1962. Notice of appeal was filed by the Board of Trade in the United States District Court for the Northern District of Illinois on November 16, 1962.

Jurisdiction of the Supreme Court to review the judgment of the three-judge District Court by direct appeal is conferred by 28 U.S.C. §§ 1253 and 2101(b). Such jurisdiction is sustained by a large number of cases, including *United States* v. *Merchants & M. Traffic Asso.*, 242 U.S.

178 (1916); *Skinner & Eddy Corp.* v. *United States*, 249 U.S. 557 (1919); *Interstate Commerce Com.* v. *Mechling*, 330 U.S. 567 (1947); *Dixie Carriers* v. *United States*, 351 U.S. 56 (1956); and *Mechling Barge Lines* v. *United States*, 368 U.S. 325 (1962).

STATUTES INVOLVED

This appeal involves the national transportation policy, note preceding 49 U.S.C. § 1, and sections 3(1), 4(1), and 13(1) of the Interstate Commerce Act, 49 U.S.C. §§ 3(1), 4(1), and 13(1). The text of those provisions is set forth in Appendix E hereto.

QUESTION PRESENTED

May the Interstate Commerce Commission, over the protest of affected shippers and localities, authorize rail carriers to maintain rates which depart from the long-and-short-haul requirement of section 4 of the Interstate Commerce Act, without considering and determining whether such fourth-section-departure rates would violate section 3(1) of the Act by causing undue prejudice against such shippers and localities?

STATEMENT OF THE CASE

This case involves the validity of an order of the Interstate Commerce Commission authorizing railroads to depart from the long-and-short-haul requirement of section 4 of the Interstate Commerce Act in order to maintain rates on corn products to the East from origins on that part of the Kankakee Belt line of the New York Central Railroad Company (NYC), which extends westward from Kankakee, Ill., to Moronts, Ill., a point near the Illinois River, a distance of approximately 83 miles, such rates being lower than the rates from points east thereof.

The basic issue raised by this appeal is whether the Commission may authorize such fourth-section departures without considering evidence submitted by the Board of Trade to show that the proposed rates would unduly prejudice Chicago grain interests in violation of section 3(1) of the Act. The Commission held that it could, saying (310 I.C.C. at 451) that the issues concerning discrimination raised by the Board of Trade "do not directly deal with the fourth-section principles here involved, but are properly matters which may be raised in investigation or complaint proceedings."[1] The Board of Trade contends that the Commission erred in so holding and that, before it may authorize fourth-section-departure rates, the Commission is required to consider, and make proper findings upon, the evidence submitted by the Board of Trade

[1] The statement of the District Court (Appendix A, p. 3a) that the Board of Trade claims error on the part of the Commission in refusing to admit evidence of discrimination and prejudice against Chicago is incorrect. The evidence was not excluded. What the Board of Trade claims is that the Commission was required to consider, before it could grant relief under section 4, whether the evidence which was admitted showed that the proposed rates would cause undue prejudice to Chicago grain interests in violation of section 3(1).

to show that the proposed rates would unduly prejudice Chicago grain interests in violation of section 3(1) of the Act.

The rates involved are illustrated by the three charts which appear on page 6 hereof, showing the rate situation from Streator, Ill., a representative point on the Kankakee Belt line, to New York, N.Y., a representative destination in the East.

As shown by Chart I, prior to December 15, 1956, there were in effect from Streator to New York, applicable via either Chicago or Kankakee, a one-factor rate on corn of 72 cents and a one-factor rate on corn products of 72.5 cents.[2]

As shown by Chart II, the underlying basis for the one-factor rates from Streator to New York via both Chicago and Kankakee was the Chicago combination composed of a local inbound rate of 23 cents to Chicago and a proportional rate from Chicago to New York. At that date, the proportional rate on corn was 49 cents and the proportional rate on corn products was 49.5 cents.

Both the one-factor rates and the Chicago combinations carried storage-in-transit and milling-in-transit privileges. As a matter of the technical application of the rates, whenever a one-factor rate was published over a particular route, it applied to the exclusion of any combination of rates. If there was no one-factor rate published over a particular route, however, then the applicable through rate was the Chicago combination. Some shippers were dependent on the one-factor rates; others were dependent on

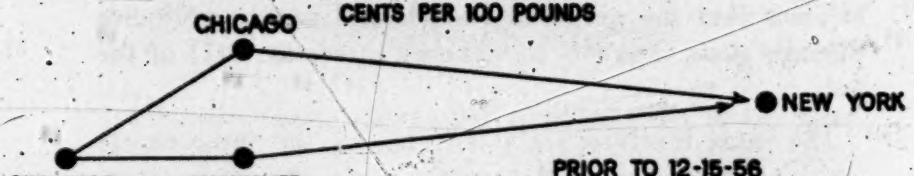
[2] Unless otherwise indicated, all rates and differences are stated in cents per 100 pounds. There have been general increases in the various rates since December 15, 1956, but this does not change the competitive situation involved.

STREATOR, ILL. TO NEW YORK, N.Y. CHART I

PRIOR TO 12-15-56

One-Factor through rates on Corn and Corn Products

CENTS PER 100 POUNDS



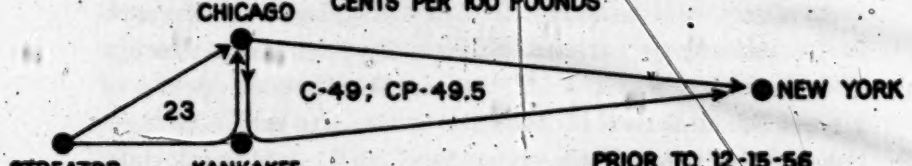
	PRIOR TO 12-15-56 CORN	PRODUCTS
One-Factor through rates		
Via Chicago	72	72.5
Via Kankakee	72	72.5

STREATOR, ILL. TO NEW YORK, N.Y. CHART II

PRIOR TO 12-15-56

One-Factor through rates were equal to Chicago Combinations

CENTS PER 100 POUNDS



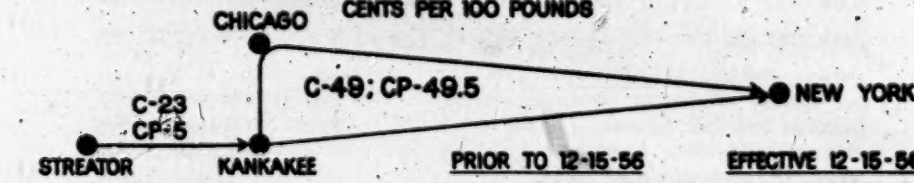
	PRIOR TO 12-15-56 CORN	PRODUCTS
One-Factor through rates		
Via Chicago	72	72.5
Via Kankakee	72	72.5
Chicago Combinations	72	72.5

STREATOR, ILL. TO NEW YORK, N.Y. CHART III

EFFECTIVE 12-15-56

New Kankakee combinations on Corn Products only when milled in transit

CENTS PER 100 POUNDS



	PRIOR TO 12-15-56 CORN	PRODUCTS	EFFECTIVE 12-15-56 CORN	PRODUCTS
One-Factor through rates				
Via Chicago	72	72.5	72	NONE
Via Kankakee	72	72.5	72	NONE
Chicago Combinations	72	72.5	72	72.5
New Kankakee Combinations	-	-	72	54.5

the Chicago combinations; but all were on a competitive equality because, as Chart II shows, the one-factor rates were exactly equal to the corresponding Chicago combinations.

The impact of the rates here involved upon the rate structure is illustrated by Chart III. Effective December 15, 1956, the NYC published a blanket rate of 5 cents[3] on corn from the involved stations on the Kankakee Belt line to Kankakee, applicable, however, only on traffic reshipped from Kankakee to the East and applicable only when the corn is milled-in-transit into corn products at Kankakee or some other point short of its final destination. The effect of this milling-in-transit requirement is to make the new low Kankakee combination rate applicable exclusively on corn products.[4] At the same time, the railroads made the one-factor rates inapplicable via Kankakee, leaving only the new, drastically reduced, Kankakee combinations to apply. To New York from Streator, this resulted in a Kankakee combination of 54.5 cents on corn products, as shown by Chart III. The rate on corn remained unchanged at 72 cents, since the 5-cent inbound rate could not be used on shipments of whole corn. The announced purpose of these changes was to meet barge competition on the Illinois Waterway to Chicago, but the NYC, however, refused to make the 5-cent rate applicable to Chicago, the barge-unloading point, where it could have been combined with the Chicago proportionals, making the Chicago combinations equal to the new Kankakee combina-

[3] By reason of subsequent general increases in the rates, this has become 6 cents at the present time, and is referred to as such in the opinion of the District Court.

[4] The mechanics of handling the shipment are that the 23-cent rate on corn is paid when the corn moves to Kankakee and the difference between the 23 cents and 5 cents is credited by the carrier against the outbound movement of corn products from the milling point.

tions. Thus, rates which historically had been made equal to the Chicago combination were changed to reflect a Kankakee combination.

These changes seriously injured Chicago grain interests in two principal ways. First, for all practical purposes, they prevented Chicago grain merchants and elevator operators from buying whole corn off the Kankakee Belt line, from which several hundred cars a year move. When corn is bought in Chicago or Kankakee, the inbound freight charges are deducted from the invoice price and are borne by the country shipper. But, on and after December 15, 1956, the processors at Kankakee and east thereof could take advantage of the new rates, knowing that, when the corn was processed and shipped out as corn products, they would secure a credit for the difference between the 23-cent rate and the 5-cent rate. They were thus in a position to offer 18 cents per 100 pounds (approximately 10 cents per bushel) more for the corn than could the Chicago grain dealers and elevator operators. Of course, they did not actually have to offer anything like that amount to control all the corn since a fraction of a cent per bushel is enough to accomplish such a purpose. The Chicago grain dealers and elevator operators, who supply whole corn to many different types of customers at a wide variety of locations, could not buy any substantial quantity of corn off the Kankakee Belt in competition with processors routing their traffic through the Kankakee gateway, resulting in undue prejudice to the Chicago merchants. The Commission did not deal with this problem at all in its report.[5]

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[5] In an attempt to appease the Chicago interests, an official of the NYC, testifying in this case on January 29, 1958, promised that the NYC would take immediate steps to remove the discrimination against whole corn by removing the milling-in-transit limitation. This promise was referred to by the Commission in its report (310 I.C.C. at 451), but to date the NYC has refused to honor this commitment.

The other way in which Chicago grain interests were injured by the rates came about by reason of differences between the application of the new Kankakee combinations on the one hand and the one-factor rates or Chicago combinations on the other hand. The Commission merely noted this problem in passing (310 I.C.C. at 451) but did not discuss it. The new Kankakee combinations were designed to meet the needs of the Kankakee processor. It is true, as the Commission noted (310 I.C.C. at 451) that the new Kankakee combinations on *corn products* applied via Chicago, but these combinations were subject to more restrictive transit privileges and more restrictive routing than Chicago processors had previously had available on the one-factor rates or Chicago combinations. So, while the Commission was technically correct in saying, insofar as *corn products* were concerned (310 I.C.C. at 451), that Chicago "has the same stature as all other corn-processing points in official territory in their [*i.e.* the Kankakee combinations'] application," the Commission did not deal with the question of why Chicago processors should not, as a matter of proper rate relations, have the same rates available to them on the basis of the Chicago combinations.

The rates involved were first published, effective December 15, 1956, in the belief, according to the railroads, that the resulting violations of the long-and-short-haul provision of section 4 of the Act were fully protected by outstanding relief. This was not the case, however, and when the railroads published additional rates to become effective July 30, 1957 (later postponed to August 29, 1957), they filed F.S.A. No. 33955 for authority to continue the rates already established and to establish and maintain the additional rates which also would result in violations of section 4 of the Act.

The new rates and the fourth-section relief sought were protested by the Board of Trade, Mechling, and several other commercial interests. The Commission, however, refused to suspend the rates, and it granted "temporary" fourth-section relief to continue the rates already in effect and to establish and maintain the newly published rates. After a period in which all the rates were under a temporary restraining order, they all became effective November 28, 1957.[6]

Throughout all stages of this proceeding the Board of Trade has actively and vigorously opposed the fourth-sec-

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[6] On August 28, 1957, Mechling and another shipper commenced an action in the United States District Court for the Northern District of Illinois to set aside and enjoin the Commission's temporary F.S.O. No. 18784, and on that date an order temporarily restraining the enforcement and operation of the order was obtained. (*A. L. Mechling Barge Lines Inc.* v. *United States*, Civil Action No. 57 C 1450.) On September 25, 1957, the Board of Trade was permitted to intervene as a party plaintiff in that action. Thereafter the United States and the Commission filed a motion to vacate the temporary restraining order and to dismiss the complaint "for lack of jurisdiction of the subject matter for the reason that the action of the Commission complained of in the complaint is vested exclusively within the power and scope of authority of the Commission and therefore are not orders which are subject to review by this Court." On November 28, 1957, the three-judge district court, without opinion, and without the entry of any findings of fact, granted the motion of the United States and the Commission, dismissed the complaint "for want of jurisdiction," and vacated the temporary restraining order. Although such action was clearly in error (*Baltimore and O. R. Co.* v. *United States*, 264 U.S. 258, 263, 264; *Dixie Carriers* v. *United States*, 143 F. Supp. 844, 853-854; *Mechling Barge Lines* v. *United States*, 368 U.S. 325 (1962)), no appeal was taken from that order, plaintiffs being of the opinion that a decision after hearing on the merits could be obtained from the Commission before such an appeal could be heard and determined by the Supreme Court, a judgment which proved to be grossly erroneous. In other litigation, however, the Department of Justice and the Commission have since conceded that such an order, granting temporary fourth-section relief without supporting findings, is invalid. *Mechling Barge Lines* v. *United States*, 368 U.S. 325 (1962).

tion relief sought. At the hearing, the Board of Trade submitted evidence to show that, even if the proposed rates were found to be compensatory and not lower than necessary to meet the alleged barge competition, they would still be unduly prejudicial to Chicago grain interests in violation of section 3(1) of the Act. As stated, however, the Commission refused to consider this evidence, holding that the issues concerning discrimination raised by the Board of Trade did not "directly deal with the fourth-section principles here involved, but are properly matters which may be raised in investigation or complaint proceedings." 310 I.C.C. at 451. Now, after five years of litigation, the Commission and the railroads would require the Board of Trade to file a formal complaint, present the same evidence all over again, and wait another three, four, or five years before it could obtain relief from the unlawful rates which are constantly depriving Chicago grain interests of business which they previously had, thereby causing them substantial and irreparable damage.

THE QUESTION IS SUBSTANTIAL.

The question here presented has never been directly ruled on by this Court. However, in *Intermountain Rate Cases*, 234 U.S. 476, 485-486 (1914), this Court, in discussing the extent of the Commission's power to relieve carriers from the long-and-short-haul requirement of section 4 of the Act, said:

> But while the public power, so to speak, previously lodged in the carrier is thus withdrawn and reposed in the Commission the right of carriers to seek and obtain under authorized circumstances the sanction of the Commission to charge a lower rate for a longer than for a shorter haul because of competition or for other adequate reasons is expressly preserved and, if not, is, in any event, by necessary implication, granted.

> And as a correlative the authority of the Commission to grant on request the right sought is made by the statute to depend upon the facts established and the judgment of that body, in the exercise of a sound legal discretion, as to whether the request should be granted compatibly with a due consideration of the private and public interests concerned, and in view of the preference and discrimination clauses of the 2d and 3d sections.

The holding of this Court that the Commission's authority to grant section 4 relief is made by the Act to depend on the facts established and the exercise of the Commission's sound legal discretion as to whether granting the request would be compatible, among other things, with the anti-discrimination provisions of section 3(1) of the Act, would seem necessarily to imply that shippers who would be injured by fourth-section-departure rates have the right to appear in the proceeding in which the carriers ask for such relief and to have their evidence considered by the Commission in determining whether such relief should be granted. The Commission, therefore, under the Act as interpreted by this Court, must, in a fourth-section proceeding, consider whether the grant of the authority sought would be compatible with section 3, if that issue is raised by a protestant who has participated in the hearing and introduced evidence on that issue. The Commission's grant of fourth-section relief in this case without consideration of properly raised section 3 issues exceeded its statutory authority.

In addition, the national transportation policy calls for the maintenance of "reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices," and it provides that "all" the provisions

of the Act shall be administered and enforced with a view to carrying out the policy; it does not say that "all of the provisions except those in section 4 of the Act" shall be so enforced. The Commission is required to take cognizance of the national transportation policy and apply the Act "as a whole." *American Trucking Assos.* v. *United States,* 355 U.S. 141, 152 (1957).

It would seem obvious that it is beyond the power of the Commission to authorize fourth-section-departure rates which would violate other sections of the Act, and, heretofore, the Commission itself has repeatedly so held.[7] The Commission did not explain why it departed, in the instant case, from its own precedents on the question of its power to grant fourth-section relief, but this may be explained

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[7] In a long line of decisions, the Commission has followed the teaching of this Court in the *Intermountain Rate Cases,* 234 U.S. 476, *supra,* and has held that it would not authorize rates which did not conform to the requirements of section 4 of the Act if such rates would violate other sections of the Act, particularly sections 2 and 3. *Commodity Rates on Lumber and Other Forest Products in Carloads, From South Pacific Coast Territory to Points in Central Freight Association Territory,* 165 I.C.C. 561, 569; *Bituminous Coal to Buffalo, N. Y.,* 219 I.C.C. 554, 560; *Differential Routes to Central Territory,* 211 I.C.C. 403, 421; *Pig Iron to Butler, Pa.,* 222 I.C.C. 1, 2; *Iron and Steel to Minnesota,* 231 I.C.C. 425, 428; *Sand and Gravel to Northfield and Evanston, Ill.,* 234 I.C.C. 65, 68; *Coal and Coal Briquets in the South,* 287 I.C.C. 341, 376-377; *Transcontinental Cases of 1922,* 74 I.C.C. 48, 71; *Passenger Fares, Hell Gate Bridge Route, New York, N. Y.* 296 I.C.C. 147, 153; *Crude Barytes Ore from Missouri to Corpus Christi and Houston,* 299 I.C.C. 505, 508; *Iron and Steel from Minnequa to Kansas, Nebraska, and South Dakota,* 278 I.C.C. 163, 168-169; *Nepheline Syenite from Ontario, Canada, to the East,* 308 I.C.C. 561, 564-565 (1959). *Railroad Commission of Nevada* v. *S. P. Co.,* 21 I.C.C. 329, 338-339. Typical expressions of the Commission in these cases on that point have been set forth in Appendix F hereto. While some, but not all, of the foregoing cases also involved investigations under section 15 of the Act, that does not impair the validity of the reasons given by the Commission as to why fourth-section relief should not be granted to maintain rates which would violate other sections of the Act.

by a dictum in the decision of a three-judge District Court for the Southern District of New York in *Seatrain Lines v. United States*, 168 F. Supp. 819 (1958), a case on which the Commission's counsel relied in the court below in support of the Commission's order and which the lower court cited in its opinion in support of its approval of the Commission's refusal to consider the issues concerning discrimination against Chicago raised by the Board of Trade. (Appendix A, p. 4a)

The *Seatrain* case was an action brought by a competing water carrier to set aside and enjoin a permanent fourth-section order, granted by the Commission without a hearing, allowing rail carriers to depart from the long-and-short-haul provision of section 4 of the Act and to charge less for the transportation of articles between eastern points of origin and southwest gulf ports than was charged to intermediate inland points. The District Court set aside and enjoined the order on the ground that it lacked the necessary supporting findings of fact.

One of the contentions made by the plaintiff water carrier in that case was that the order discriminated against it. Although not necessary to the decision in the case, the order having been set aside on other grounds, the District Court said (p. 824):

> However, Section 4 does not contemplate that there shall be a determination in a Section 4 proceeding as to whether the rates charged are unduly discriminatory against a competing water carrier. This question must be raised by proceedings under Sections 13 and 15 of the Interstate Commerce Act. In such proceedings a hearing must be held at which all parties affected, carriers, shippers and communities, can be heard and their respective interests appropriately weighed and balanced by the Commission.

> Thus, in so far as the plaintiff claims discrimination against it resulting from the new authorized rates, it has not exhausted its administrative remedies because it has not petitioned for a hearing under Sections 13 and 15 at which such claims would be determined.

Since Seatrain succeeded in setting aside the order involved, it did not appeal; the Government did not appeal, and the Commission reopened the case for further proceedings.

The District Court in *Seatrain* cited no authority, did not discuss the opposing arguments, gave no reasons for its decision, and did not even refer to the national transportation policy to the effect that all sections of the Act should be administered and enforced to carry out the policy against unjust discriminations and undue preferences and advantages. The dictum in the *Seatrain* case is plainly wrong.

Another case cited by the court below was *United States* v. *Merchants & M. Traffic Asso.*, 242 U.S. 178 (1916) (the *Sacramento* case), which the lower court cited for the proposition that the Board of Trade's evidence "was not relevant in this Fourth Section proceeding." (Appendix A, p. 4a) The *Sacramento* case clearly does not so hold since the parties who sought court review in that case had not even participated in the hearings before the Commission. In that case, those parties applied, after the entry of the Commission's order complained of, for a rehearing for the purpose of introducing new evidence to show discrimination against them. After their petition for rehearing was denied, they brought suit to set aside and enjoin the order. This Court held that, under the circumstances, their remedy was under sections 13 or 15 of the Act.

In so holding, the Court said (p. 188):

> Respondents contend that, after the amended order was entered and the tariffs filed, they did apply to the Commission for relief, "but were denied the right of a hearing," and that "their protest and demand were ignored and denied." What they did was to petition for a "rehearing" in the proceedings under the 4th section, to which they now say they were not parties, instead of applying for redress under § 13, as they had a legal right to do. They mistook their remedy. To permit communities or shippers to seek redress for such grievances in the courts would invade and often nullify the administrative authority vested in the Commission; . . .

It is apparent, therefore, that the holding of this Court in the *Sacramento* case is no precedent for denying appellant relief here. The Board of Trade was a party to all the Commission proceedings. It has had a hearing at which it submitted evidence showing discrimination against Chicago. It filed a brief and was heard on oral argument. But the Commission refused to consider that evidence on the ground that the issues raised by the Board of Trade did not concern "fourth-section principles."

In addition to the *Sacramento* case and the *Seatrain* case, the lower court also cited in support of its holding, *Koppers Co.* v. *United States,* 132 F. Supp. 159, 163 (D.C. W.D. Pa., 1955) and *Florida Citrus Comm'n* v. *United States,* 144 F. Supp. 517, 526 (D.C.N.D. Fla., 1956). These two cases are not in point. Neither of those cases involved the requirements of section 4 of the Act. In both of those cases the court simply declined to set aside a Commission order in a "general revenue increase" case, saying that the remedy of a person aggrieved by such an order was under section 13(1) or section 15(1) of the Act. The sit-

uation here is entirely different. The present case is not a "general revenue increase" case. It is a specific "rate" case, in which the Commission has authorized particular rates which result in undue prejudice to some shippers and undue preference of others.

There can be no dispute over the fact that the Commission's holding in this case, if affirmed by this Court, would work a severe hardship on the Board of Trade. When this case started, the Commission had given no indication that it would depart from the principle, which it had consistently followed, that it would not grant relief to maintain fourth-section-departure rates which violated other sections of the Act. It permitted the Board of Trade to introduce evidence as to the undue prejudice against Chicago grain interests, which it should not have done had it considered that such evidence was not "relevant" to the issues before it. And now, after more than five years of litigation, during which time the business of the members of the Board of Trade has been irreparably damaged by a temporary fourth-section order which was invalid in the first place[8] and by a permanent fourth-section order which was issued without regard to the Commission's obligations under the Act, the Commission and the railroads ask that the Board of Trade be required to file a formal complaint under section 13(1), introduce the same evidence, and try the same issues all over again. Even in the *Seatrain* case, all that the court there suggested was that "a hearing must be held at which all parties affected, carriers, shippers and communities, can be heard and their respective interests appropriately weighed and balanced by the Commission.'"[9] 168 F. Supp. at 824. When such a hearing

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[8] See footnote 6, p. 10.

[9] It will be remembered that in the *Seatrain* case there had been no hearing prior to the grant of *permanent* fourth-section relief.

has already been held under section 4(1), it would seem to be the height of absurdity to require another such hearing to be held under section 13(1).

The problem presented by this appeal is a constantly recurring one, affecting many shippers in addition to those at intermediate points. This is attested to by the number of cases cited in Appendix F hereto. Indeed, it would be a rare occurrence in a contested fourth-section case if the interests of such shippers were not vitally involved. Up to this time, the Commission has always considered the evidence of shippers who either protested or supported the granting of fourth-section relief. There is nothing in either the Commission's general rules of practice (49 CFR 1.1-1.102) or in its special rules governing the handling of fourth-section applications (49 CFR 143.75-143.85) which in any way restricts the right of an injured shipper to be heard in opposition to the granting of such relief, or which even suggests that the evidence of such a shipper, once admitted, will not be considered. But the right of the shipping public to be heard and to have its evidence considered in a fourth-section case will be subject to doubt and confusion until the obligations of the Commission in such a case are definitely settled, and the only way they can be definitely settled is by a decision of this Court.

Not only is the legal issue presented by this appeal of general public importance, but, in addition, the effect which the result of the decision will have upon an important segment of the grain-rate structure, of itself, makes this a case of general public importance. Throughout the period of this litigation, the Kankakee combinations have had a very disturbing effect on the structure of grain rates from Illinois to the East. A majority of a special grain

committee of the eastern railroads has twice recommended the cancellation of this adjustment[10]. The predictions of that committee have proved to be correct. The competitive pressures set up by this adjustment have been enormous. An elevator having the benefit of these special, preferential rates, can take all the business away from a competing elevator just a few miles away which does not have the benefit of the rates, causing cross-country competition affecting all railroads and shippers in the area.

There are now pending before the Commission four proceedings which have resulted, at least in part, from the establishment of the Kankakee combinations on corn products here in issue: No. 33471, *Corn & Corn Products—Illinois & Indiana to the East;* No. 33743, *Corn & Corn Products from Illinois & Indiana to Md., Mass., N. Y., Va.;*

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[10] In a report, dated April 13, 1961, that committee said:

> The Item 279 publication [*i.e.* the Kankakee combinations] grew out of approval by the Traffic Executive Association—Eastern Railroads at the October 18, 1956 meeting (Topic 19), of the proposal that had been considered and declined by the General Freight Traffic Committee—Eastern Railroads under Submittal No. C1301-383. That proposal suggested the establishment of a rate of 5 cents per 100 pounds including the X-196 increase on corn, carloads, minimum weight 100,000 pounds to Kankakee, Ill. from NYC(W) stations located west of Kankakee for application only as described above. The purpose of that tariff revision was to enable the New York Central to meet Illinois River competition which had severely reduced the tonnage from the NYC(W) stations involved. With cancellation of the Item 279 adjustment, the general basis of rates recommended will meet the competitive situation that Item 279 was designed to meet. The cancellation is recommended by the majority of the TEA-ER Special Grain Committee because it is felt that the maintenance of the Item 279 adjustment will lead the way for demands for similar publication on behalf of other interests thereby contributing to a further erosion of the general rate level and because maintenance of the Item 279 adjustment presents a difficult cross-country situation for rail lines serving adjacent stations.

No. 33916, *Corn & Corn Products from NYC Origins in Ill. & Ind. to the East;* and I. & S. No. 7807, *Corn & Corn Products—Illinois & Indiana to the East.* A recommended report of the hearing examiner in the case last named has just been released, in which he referred to the Commission's report in the *Kankakee* case as follows (p. 23):

> In the past when the rail carriers were in control of the grain rate adjustment free of competition from other modes, the Commission, in numerous proceedings has consistently refused to extend the rate-breaking system to communities which did not meet the specifications of a primary market. *The Kankakee Case* 310 I.C.C. 437, above mentioned, is the only exception, which took effect in December 1956, and that is based strictly on considerations of section 4.

That statement shows the uncertainty which is going to exist until this Court finally determines the obligations which the Commission must meet in granting relief from the provisions of section 4 of the Act, by holding that the Commission may not, in purported reliance on "fourth-section principles," refuse to consider evidence submitted by shippers who would be injured which shows that the fourth-section-departure rates for which authority is sought would be in violation of section 3(1) of the Act.

CONCLUSION

For the reasons stated, it is submitted that the question presented by this appeal is substantial, that it is of public importance, and that, in its decision, the Court should have the benefit of briefs on the merits and of oral argument.

Respectfully submitted,

HAROLD E. SPENCER
RICHARD M. FREEMAN
One North LaSalle Street
Chicago 2, Illinois
Counsel for Board of Trade of the City of Chicago, Appellant

J. S. CHARTRAND
141 West Jackson Blvd.
Chicago 4, Illinois

BELNAP, SPENCER, HARDY & FREEMAN
One North LaSalle Street
Chicago 2, Illinois
Of Counsel

Dated: January 11, 1963

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

A. L. MECHLING BARGE LINES, INC., et al.,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, et al.

No. 61 C 169

Before KILEY, Circuit Judge, and HOFFMAN and AUSTIN, District Judges.

This is a suit by Mechling Barge Lines, Inc., a common carrier, and several grain elevator operators served by barges, to set aside an order of the Interstate Commerce Commission. The order continued in existence a reduced rail rate for corn and corn products transported on the New York Central Belt Line. The Chicago Board of Trade was permitted to intervene as a plaintiff and the New York Central Railroad and several grain elevator operators on its Belt Line were permitted to intervene as defendants.

The Belt Line west of Kankakee, Illinois, roughly parallels the Illinois River on which the barges operate. The barge lines and elevators served by them are in competition with the Belt Line and elevators served by it for the business of transporting corn from northern and central Illinois to destinations on the eastern seaboard. Some farmers sell their corn to elevators for transportation by barge to an east-west railroad and others sell theirs to elevators for transportation by the north-south Belt Line to a connecting east-west railroad or to merchants in Chicago. The transportation rates are of course very important in the competition.

Prior to the published New Kankakee all-rail combination rate, the through one-factor rates for grain and grain products from Streator on the Kankakee Belt Line to New York were 72.5¢ per cwt.; the Chicago combination from stations on the Kankakee Belt Line consisted of a local rate of 23¢ to Chicago, plus the 49.5¢ reshipping rate east, or 72.5¢ per cwt.; the Kankakee combination rate from stations on its Belt Line to Kankakee and reshipping to the east was also composed of the same rate factors. Thus, the through one-factor rates, the Chicago combination and the Kankakee combination, were all equal.

The proposed new Kankakee combination reduced the rate on corn and corn products from stations on the Kankakee Belt Line to 6¢ on corn milled-in-transit for the purpose of meeting the barge competition on the Illinois River, plus a reshipping rate of 49.5¢ beyond Kankakee to the east. The local, or 6¢, rate was to apply only when the product was destined for shipment to eastern destinations. The local, or 6¢, rate was not applicable to whole corn, nor was the rate to Chicago reduced although the Kankakee combination was available to Chicago processors via Kankakee. Application of the new Kankakee combination resulted in a charge less for the longer than for the shorter distance of transportation in that a lower charge from stations west of Kankakee to the east was effected than resulted from Kankakee and intermediate origins to the same destinations.

The New York Central Railroad applied to the Commission for approval, to obviate the violations of 49 U.S.C.A. Section 4[1], of a proposed rate. Plaintiffs and the Board

[1] 49 U.S.C.A. Section 4. Long and short haul charges; competition with water routes.

of Trade protested the application. The Commission granted temporary authority for immediate application of the rate, but ordered a hearing.

The scope of review to be accorded this order is conceded by all litigants to be governed by the Administrative Procedure Act, 5 U.S.C.A., particularly Section 1009(e).[2] Because no dispute exists as to the standards to be applied, this court will allude briefly to the basic concept of such review. In *Rochester Tel. Corp.* v. *United States*, 307 U.S. 125, 140 (1938), the scope of review is stated to be as follows:

> "* * * Only questions affecting constitutional power, statutory authority, and the basic prerequisite of proof can be raised. If these legal tests are satisfied, the Commission's order becomes incontestable. *Interstate Commerce Comm.* v. *Illinois Central R. Co.*, 215 U.S. 452, 470; *Interstate Commerce Comm'n* v. *Union Pacific R. Co.*, 222 U.S. 541."

Plaintiffs claim error in the refusal of the Examiner and the Commission to admit evidence that the proposed rate was discriminatory, unjust and unreasonable, in violation of the Transportation Act;[3] and that the rate failed to preserve the inherent advantage that the National Transportation Policy[4] gives the water carrier. The evi-

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[2] Section 1009(e) provides for the scope of judicial review of agency action to ensure that such action is not unlawfully withheld or unreasonably delayed, or not in accordance with law, procedural or substantive, and that such action is warranted in fact and supported by substantial evidence.

[3] 49 U.S.C.A. Section 15(1).

[4] The declared national transportation policy is to provide, preserve and promote the "fair and impartial regulation of all modes of transportation * * * to recognize and preserve the inherent advantages of each," in order to ensure a national transportation system adequate to meet the needs of commerce and national defense. 49 U.S.C.A. note preceding Section 1.

dence was excluded for the reason that it was not appropriate in this "Fourth Section" proceeding although it would be pertinent upon a complaint under Section 13(1)[5] or a Commission investigation under Section 15(1).[6]

Plaintiffs argue that the Examiner and Commission were bound not to grant the application under Section 4 if to do so involved violation of the other sections noted. We are referred to the Commission's conclusion that granting the application "would not be disharmonious with the other provisions of the Act," to show what the plaintiffs contend is an inconsistency.

We may disregard that conclusion as surplusage and we see no error in the exclusion of the evidence of violation of other sections of the Act. The relief granted is permissive only and the evidence offered was not relevant in this Fourth Section proceeding. *United States* v. *Merchants & M. Traffic Ass'n*, 243 U.S. 178 (1916). Due regard was given to the policy and statutory scheme of the Act within the limits afforded by Section 4 and under that Section the Commission is not required to make specific ultimate findings that a rate is lawful and not discriminatory. The water carrier and other plaintiffs have failed to utilize the provisions of sections of the Act which afford the Commission the proper scope for such determination. *United States* v. *Merchants & M. Traffic Ass'n*, 242 U.S. 178, 188 (1916); *Koppers Co.* v. *United States*, 132 F. Supp., 159, 163 (D.C. Pa., 1955); *Florida Citrus Comm'n* v. *United States*, 144 F. Supp. 517, 526 (D.C. Fla., 1956); *Seatrain Lines* v. *United States*, 168 F. Supp. 819, 825 (D.C.N.Y., 1958).

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[5] 49 U.S.C.A. Section 13(1).
[6] 49 U.S.C.A. Section 15(1).

The Commission found that the "competitive situation which prevailed prior to the proposed rate between the all-rail and barge-rail rates" needed an adjustment under Fourth Section relief. It required a showing that the proposed rates are "reasonably compensatory and no lower than necessary to meet the competition." It found that the evidence that the proposed rate was compensative and set forth the details supporting that finding, and concluded that the New York Central had shown "a special case within the meaning of Section 4[7] of the Act by nature of actual and compelling competition," and that the rate was no lower than necessary to meet that competition, was not destructively competitive and would not impose an undue burden on other traffic.

The question raised upon these findings and conclusions is whether the Commission was correct in considering the entire combination rate within the compensatory test of Section 4, or whether, as the Hearing Examiner did, it should have confined such test to the local rate from Moronts to Kankakee, *i.e.*, the 6¢ rail charge for the trip from the western origins of the Kankakee Belt Line to Kankakee. Admittedly, the only rate competitive to the barge route is the local or proportional rate to Kankakee, there having been no change in the 49.5¢ reshipping rate to the east. However, as the Commission emphasized, the

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[7] Section 4 of the Transportation Act provides:

"* * * That upon application to the Commission and after investigation, such carrier, in special cases, may be authorized by the Commission to charge less for longer than for shorter distances for the transportation of . . . property . . . but in exercising the authority conferred upon it by this proviso, the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and no such authorization shall be granted on account of merely potential water competition not actually in existence; . . ."

6¢ charge is not collected separately. When shipments originate west of Kankakee they are shipped to Kankakee via the local or flat rate of 23¢ and only when there is a reshipment for corn milled-in-transit to points east of Kankakee will the 6¢ rate be applied. Thus, on reshipment east, there is adjustment made giving recognition to through shipping by reducing the flat or local rate to the 6¢ figure. Consequently, the 6¢ does not exist as a separate charge, but exists only when the combination rate comes into being and a departure from the prohibition of Section 4 occurs when the 49.5¢ reshipping rate is applied. It is clear from the legislative history of this section that Congress was concerned with the long-haul being reasonably compensatory to the carrier and that the Commission so find to grant Section 4 relief. See *Detroit Board of Trade* v. *Grand Trunk Railway*, 2 I.C.C. 199, 202 (1888); *Imperial Coal Co.* v. *Pittsburgh & L.E. R. Co.*, 2 I.C.C. 436, 445 (1889); and *Sheldon Axle & Spring Co.* v. *Lehigh* v. *R.R. Co.*, 53 I.C.C. 43, 44 (1919). The Commission was correct in considering the combination rate and not the single 6¢ proportional.

The final question is whether the report and the findings and conclusions are supported by substantial evidence in the record as a whole. A departure from Section 4 is accorded only in special cases. The record is replete with exhibits and testimony which show that prior to the changed rate almost all free corn, as distinguished from government corn, grown in the geographical area involved was shipped via barge to Chicago and thence by rail to its eastern termini. This obvious disparity of corn shipment was found to exist by the Hearing Examiner and the Commission. 310 I.C.C. 438-441. That a special case exists by virtue of actual and compelling competition has been recognized. *In re Louisville & Nashville R.R. Co.*, 1

I.C.C. 31, 78 (1887); *Intermountain Rate Cases, supra; Skinner & Eddy Corp.* v. *United States,* 249 U.S. 557 (1919); *Nepheline Syenite from Ontario, Canada to the East,* 308 I.C.C. 561, 564-565 (1959).

A reasonably compensatory rate was defined by the Commission in the *Transcontinental Cases of 1922,* 74 I.C.C. 48, 71, as follows:

> "• • • We are of the opinion and find that in the administration of the fourth section the words 'reasonably compensatory' imply that a rate properly so described must (1) cover and more than cover the extra or additional expenses incurred in handling the traffic to which it applies; (2) be no lower than necessary to meet existing competition; (3) not be so low as to threaten the extinction of legitimate competition by water carriers; and (4) not jeopardize the appropriate return on the value of carrier property generally, as contemplated in Section 15(a) of the act."

These criteria have received judicial approval. See *Dixie Carriers* v. *United States,* 143 F. Supp. 844 (D.C. Tex., 1956). In the instant case comparative earnings, rate levels and operating costs were submitted to support the compensativeness of the proposed rate. 310 I.C.C. 437, 448-449. This was a proper formula to support the Commission's finding. *Fed. Power Comm'n* v. *Natural Gas Pipeline Co.,* 315 U.S. 575, 586 (1942); *United States* v. *Northern Pacific Ry. Co.,* 288 U.S. 490, 500 (1933); *Youngstown Sheet & Tube Co.* v. *United States,* 295 U.S. 476, 480 (1935); *City of Harrisonburg* v. *Chesapeake & O. Ry. Co.,* 34 F. Supp. 64, 644-645 (D.C. Va., 1940); *Tidewater Associated Oil Co.* v. *A. T. & S. F. Ry. Co.,* 278 I.C.C. 586, 589; *Summer Co.* v. *Erie R. Co.,* 262 I.C.C. 43, 46. In finding that the rate was no lower than necessary, the Commission also examined the bid prices of the two modes of transportation and the effect they had on those country

elevators located between the Illinois River and the Belt. In finding that the rate was not destructive of competition nor unduly burdensome, the Commission had before it evidence of the amount of corn shipped via the two modes of transportation in the periods here in question.

In scrutinizing the evidence upon which the order is premised, the court will not consider the "expediency or wisdom of the order, or whether, on like testimony it would have made a similar ruling,". *Interstate Commerce Comm'n* v. *Union Pacific R. Co.*, 222 U.S. 541, 547, 548 (1911); *Virginian Railway Co.* v. *United States*, 272 U.S. 658, 663 (1926); *United States* v. *Pierce Auto Lines*, 327 U.S. 515, 536 (1945), but will consider only whether in the record as a whole there is substantive evidence to support the order. 5 U.S.C.A. Section 1009(e); *Universal Camera Corp.* v. *Labor Board*, 340 U.S. 474 (1950).

There is no challenge of the detailed facts underlying the findings or conclusions and we find that there is the requisite substantial basis for the findings and conclusions. *Rochester Tel. Corp.* v. *United States*, 307 U.S. 125, 140.

We conclude that the order in question was within the statutory power of the Commission, that it is supported by findings and conclusions based on substantial evidence, and that no prejudicial error occurred in the hearings before the Examiner and Commission. For these reasons we think the complaint should be dismissed. The order of dismissal is being entered this day.

DATE: September 18, 1962.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

A. L. MECHLING BARGE LINES, INC., et al.
v.
UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, et al.

61 C 169

JUDGMENT

The above entitled cause having come on for final hearing before a duly constituted district court of three judges convened pursuant to Sections 2284 and 2326 of Title 28, United States Code, and the Court having considered the pleadings and the record before the Commission, and the arguments and briefs of counsel, and the Court being fully advised in the premises and having filed its opinion, it is hereby

ORDERED, ADJUDGED and DECREED that the relief prayed for in the complaint be, and it is hereby, denied, and the complaint is dismissed, plaintiff to pay the costs.

Dated this 18th day of September, 1962.

s/ ROGER J. KILEY
Judge, United States Court of Appeals

s/ JULIUS J. HOFFMAN
Judge, United States District Court

s/ RICHARD B. AUSTIN
Judge, United States District Court

29096

INTERSTATE COMMERCE COMMISSION

FOURTH SECTION APPLICATION NO. 33955

CORN AND CORN PRODUCTS FROM ILLINOIS TO OFFICIAL TERRITORY

Decided June 8, 1960

Authority granted, on conditions, to continue or to establish and maintain on corn products from origins in northern Illinois on that part of the New York Central Railroad's Kankakee Belt Line extending eastward from Moronts to Van's Siding, Ill., both inclusive, to points in central, trunkline, and New England territories, rates composed of a combination of proportional rates to and from Kankakee, Ill., without observing the long-and-short-haul provision of section 4 of the Interstate Commerce Act.

Richard J. Murphy, *William C. Leiper*, and *Daniel J. Sweeney* for applicants.

Freeman Bradford, *Leo P. Day*, and *A. C. Schier* for interveners in support of the applicants.

Edward B. Hayes, *Wilbur S. Legg*, *Nuel D. Belnap*, *Harold E. Spencer*, *Richard J. Hardy*, *Richard M. Freeman*, *James V. Springrose*, *Lawrence Farlow*, *James C. Scott*, *I. M. Funk*, *Ronald E. Tallyn*, *E. S. Herron*, *R. D. Erickson*, and *J. S. Chartrand* for protestants.

REPORT OF THE COMMISSION

DIVISION 2, COMMISSIONERS HUTCHINSON, MCPHERSON, AND HERRING

BY DIVISION 2:

The parties filed exceptions to the report proposed by the examiner, to which replies were made. We have heard the parties in oral argument. Our conclusions differ from those recommended in the proposed report. Exceptions and requested findings not discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

By this application, as amended, carriers parties to the New York Central Railroad Company tariff I.C.C. No. 1169 and Agent H. R. Hinsch's tariff I.C.C. Nos. 4403 and 4499, apply for authority to continue or to establish and maintain over their existing direct all-rail routes for the transportation of corn products from origins in northern Illinois on that part of the New York Central's Kankakee Belt Line extending eastward from Moronts to Van's Siding, Ill., both inclusive, to points in central, trunkline, and New England territories, rates composed of a combination of proportional rates

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to and from Kankakee, Ill., as hereinafter described, without observing the long-and-short-haul provision of section 4 of the Interstate Commerce Act.

The schedules containing the rates and the application were protested by A. L. Mechling Barge Lines, Inc., hereinafter called Mechling, Cargill, Inc., and the Waterways Freight Bureau, as well as by the Board of Trade of the city of Chicago, the Indiana Board of Trade, two State associations of Illinois elevators, the Illinois Grain Corporation, the Norris Grain Company, and others. The General Foods Corporation, Indianapolis Board of Trade, Evans Milling Company, Illinois Cereal Mills, and several operators of elevators on the Kankakee Belt Line of the New York Central intervened on behalf of the applicants. Suspension was denied, and fourth-section relief was granted temporarily by order No. 18784, entered August 27, 1957, until further order after hearing.

However, on August 28, 1957, certain of the protestants filed an appeal with the United States District Court for the Northern District of Illinois, Eastern Division, to set aside the Commission's temporary fourth-section order and to enjoin the use of the rates without fourth-section relief. A temporary restraining order was issued on that date making the Kankakee combinations inoperative until November 28, 1957, when the court order was vacated and the court action dismissed.

A hearing has been held in the matter of the fourth-section relief sought and several of the respective parties introduced testimony and other evidence according as their interests were affected. In the interest of clarity the rates for which fourth-section relief is herein sought will be referred to as the proposed rates, and those in effect previously as the prior rates. Except as otherwise indicated, all rates and charges are stated in amounts per 100 pounds, include the increase authorized in Ex Parte No. 206, and are subject to the increase authorized in Ex Parte No. 212.

The proposed reduced rates are designed to recapture traffic represented as having been lost to competing barge lines operating by way of Chicago in conjunction with rail lines beyond. The carriers do not desire to reduce existing rates at higher rated intermediate points not affected by the same competitive conditions.

Historically, the rail rates on grain and grain products from northern Illinois, including the considered origins, to eastern destinations were combinations over Chicago, Ill., and later when single-factor rates were established they were made equal to the combinations, the rates on the corn products having been maintained uniformly 0.5 cent higher than the rates on grain. On traffic accorded transit, the local or flat rates were generally observed to the gateway points, for example Chicago or Kankakee, and the

reshipping rates therefrom applied on the outbound movement, observing as minimum the single factor through rate or the flat rate from the gateway, whichever was higher, in conformity with outstanding fourth-section relief.

In an effort to meet the competition of the barge-rail routes, effective December 15, 1956, the New York Central established a proportional rate of 5 cents (subsequently increased to 5.5 and 6 cents, respectively, under Ex Parte Nos. 206 and 212), minimum 100,000 pounds, on corn and corn products from the considered origins to Kankakee over its line direct for application in conjunction with the existing proportional or reshipping rates beyond on traffic milled in transit and finally destined to points in the western termini of eastern trunklines and east thereof. At the same time, the through single-factor rates from these origins to final destination, as well as the flat rate from Kankakee to final destination, previously observed as minimum in connection with the prior rates, were restricted so as not to apply when the combination of the proposed proportional rates to and from Kankakee to final destination is lower. The proposed rates were permitted to become effective at that time without protest and were published in the belief that outstanding relief protected any departures which might occur. However, it was subsequently discovered that by limiting the rates to points at the western termini of eastern trunklines and east thereof, unauthorized departures were created at destinations in central territory. Moreover, by eliminating the application of the single-factor through rates from origin to final destination, as well as the flat rate from Kankakee to final destination as minimum, origin departures were created at Kankakee and points east, north, and south thereof. To eliminate the unauthorized destination departures the same combination of proportionals was established for application on like traffic from the same origins to destinations in central territory effective July 30, 1957, which date was voluntarily postponed until August 29, 1957, and because of the temporary restraining order entered by the court did not become effective until November 28, 1957.

The considered rates, as indicated, are designed to meet the barge-rail combination rates over Chicago, comprising the local barge rates to Chicago and the rail reshipping rates to eastern destinations, which are the same as in effect from Kankakee. The local barge rates from 10 Illinois River ports [1] to Chicago ranged from 3.5 to 6 cents on December 5, 1957, and effective December 6, 1957, 3.65 to 6.25 cents when they were increased slightly. There is no milling-in-transit requirement for the application of the barge-rail combination

[1] Lockport, Joliet, Morris, Seneca, Ottawa, La Salle, Spring Valley, Hennepin, Henry, and Lacon, Ill.

rates. In arriving at the inbound proportional under the proposed rates, the weighted average barge rate of 4.695 cents on the barge movement for the period December 16, 1956, to November 11, 1957, from the 10 ports to Chicago was considered as the competitive rate. On the same movement the weighted average barge rate would be 4.295 cents effective December 6, 1957.

The proposed rates have application only in connection with the reshipping rates on grain products insofar as they apply on certain corn products. In the first instance the corn is moved from its Belt origin to Kankakee or other transit points in official territory under the flat rate. After milling in transit and reshipment of corn products, the inbound charges are readjusted on the basis of the proportional rate on corn to Kankakee and the reshipping rates on grain products from Kankakee, and the credit is applied to the outbound movement of corn products. Charges for the shrinkage and manufacturing loss remain on the basis of the local rate to the transit point.

The Kankakee Belt Line west of Kankakee roughly parallels the Illinois River in northern Illinois. Morents is on the river about 4 miles from the nearest river port of Spring Valley, Ill., and Van's Siding, which is the most distant point from the river, is about 32 miles south of its nearest port of Joliet, Ill. The northern Illinois territory produces a surplus of corn. At one time, the corn moved over all-rail routes to eastern destinations. However, the development of commerce on the Illinois River about 20 years ago started a diversion of the all-rail movement to barge-rail routes extending from river ports by barge to Chicago, Ill., and thence by rail to eastern destinations. In 1935, 1940, and 1957, respectively, about 1.5, 19, and 80 million bushels of grain, including 0.7, 16, and 34 million bushels of corn, moved by barge from all Illinois River ports to Chicago. The bulk of the corn moved by barge originates at the 10 river ports which range from 4 to 36 highway-miles from the Belt origins, and is drawn from farms ranging up to 40 miles from the ports.

The primary business available to the New York Central at the origin points is grain, predominately corn, traffic. During 1954, 1955, and 1956, respectively, 467, 729, and 615 carloads of grain, including 305, 532, and 404 carloads of corn originated thereat. Most of it was Commodity Credit Corporation corn[3] which is usually shipped by rail for export, and is not subject to the same competitive forces as "free" corn.[4] In 1957, however, for the 6-, 8-, and 12-month periods ended June 30, August 31, and December 31,

[3] Corn under Government control.
[4] Corn available on the open market.

1957, respectively, 1,515, 2,411, and 2,661 carloads of corn were originated at the Belt origins.

The 1956 corn crop in the area was somewhat heavier than the 1955 crop, thus increasing the movement in 1957. During the period December 15, 1956, to August 30, 1957, hereinafter called the competition period, when the proposed rate was in effect the barge movement by barge from the 10 river ports to Chicago amounted to 402,662 tons, including 267,256 tons by protestant A. L. Mechling Lines, Inc.* Lockport and Joliet, the river ports nearest Chicago, are not affected by the reduced rate to the same extent as the other ports. From Hennepin, Henry, and Lacon, the three ports south of Morenta, the greater part of Mechling's corn business moved to the south in 1956 and north to Chicago in 1957. From the other five ports affected, Mechling's barge movement to Chicago was lower by 22,928 tons in the competition period than during the corresponding period a year earlier.

Cargill Incorporated, Illinois Grain Corporation, Norris Grain Corporation, W. W. Dewey Company, and Glidden Company, operate subterminal elevators at one or more of the ports. Cargill Incorporated's corn purchases at three elevators from the area south of the river dropped from 1,632,092 bushels in the period December 15, 1955, to August 31, 1956, to 1,171,229 bushels in the competition period. From the same area Illinois Grain Corporation purchased 854,226 and 365,005 bushels during the first 8 months of 1956 and 1957, respectively. Norris Grain Corporation experienced purchase declines in 1957 under 1956 at three elevators. The decline at the one elevator most affected amounted to 646,280 bushels in the first 6 months of 1957 under the first 6 months of 1956. W. W. Dewey Company's purchases from four points on the Belt were reduced from 190,000 bushels in the first 8 months of 1956 to 15,000 bushels in the same period of 1957. Glidden Company's elevators were opened in the fall of 1956. Its limited experience indicates a decline in purchases in the area subsequent to the effectiveness of the proposed rate.

The river subterminal elevators are intermediate between the terminal elevators in Chicago and the country buyers in northern Illinois. They are generally operated by the terminal elevators and were established to accumulate corn for river movement. With the exception of Dewey, which purchases both from country buyers and direct from the farmer, this accumulation is by purchase through the country elevatorman. Originally the country elevators sold to

* Includes A. L. Mechling Barge Lines, Inc.'s, wholly owned subsidiary, Marine Transit Company.

buyers for all-rail movement. Their facilities were designed to receive grain from the farmers, assemble it in enclosed lots, and load it into rail cars, these being the same functions as to rail corn as are performed by the subterminal elevators to barge corn. The advent of river transportation and the establishment of subterminal elevators opened another outlet for the corn. In the years immediately preceding the establishment of the proposed rate, when the corn rates on the Belt were prohibitively high, the country elevators near or at the Belt became, for the most part, buyers or merchandisers of corn for barge movement, and elevated only small quantities of corn for which there were local retail requirements. For his service, the country elevatorman realizes from 1 to 4 cents a bushel depending on whether he actually performs an elevation or merely serves as a merchandiser.

The corn is moved from the farms to the elevators in farmer-owned or for-hire trucks, the cost of which, in either case, is borne by the farmer. Most of the corn sold at the river comes directly from the farm with only a small portion coming from the country elevators. The for-hire truck rates are on a distance scale filed and fixed by the Illinois Commerce Commission. They range from 2 to 4 cents a bushel for distances ranging up to 30 miles.

Bids to the farmers are based on the price at the most advantageous terminal market less the country buyers markup and transportation costs. River bids are f.o.b. trucks at river elevator, while Belt bids are f.o.b. rail cars. At the Belt, the farmer stands the cost of elevation; at the river, he does not. Prior to the proposed rate, the free corn sales of elevators on the Belt were made to the river elevators, because corn for river transportation commanded higher prices than corn for rail transportation. The higher prices were attributed to the ability of the river buyers to market the corn at lower transportation costs over the barge-rail routes than rail buyers over the all-rail routes. Since the effectiveness of the proposed rates, it became more profitable for these Belt elevators to ship by rail, and the farmers benefited by the competitive bidding. Despite their ability to pass on to the farmers the advantage of competitive bids, these Belt elevators assert that the amount of corn handled by them has not increased. There is a difference in their business, however, for rather than performing merely the merchandising service on barge corn, they now perform an actual elevation on rail corn. Several country elevators with rail facilities from 3 to 11 miles from the Belt have established portable loaders on the Belt. The 14 supporting elevators contend that without a competitive rail rate, they would again be relegated to the status of merchandisers for

barge movement and the investments in their elevators and facilities for rail shipment would be virtually destroyed.

Of the opposing country elevators, eight are located between the Illinois River and the Belt, two are south of the Belt, one is north of the river, and one is on the river and is not served by rail. The last-mentioned elevator buys corn from farmers as much as 18 miles south of the river or within 3 miles of the Belt. Although it has not been affected by the proposed rate, it recognizes the possibility of some loss in its south territory. The others, though served by rail lines other than the Belt, sell most of their "free" corn at the river, and consequently have been adversely affected by the proposed rate. Th majority have lost "free" corn business. Most seriously affected was one located at the same point as an elevator served by the Belt. Its business exceeded 250,000 bushels in each of the years 1955 and 1956, but it shipped only 71,000 bushels in 1957[*] and nothing in January 1958. The total decline in "free" corn business of all these country buyers, under 1956, was less than 25 percent. One of them shipped a portion of its 1957 business through an elevator on the Belt at a cost of over half of its usual commission on such sales. Another located midway between the Belt and the river, actually experienced a business increase, 1957 over 1956, with most of its corn going to the river. Its rail shipments declined from 258 carloads in 1956 to 78 carloads in 1957. Another believed that the proposed rate would be a temporary situation, and to retain its farmer customers it absorbed the difference, amounting to $1,800, between bids on corn in rail cars at competitive Belt elevators and bids in cars at its elevator.

The proposed rate has enabled the Belt elevators to outbid the middlemen seeking to purchase corn near the Belt area for river shipment. On January 30, 1958, the prices bid for corn per bushel were $1.09 in car at Minal, Ill., on the Belt, $1.04⅞ in car at Kernan, Ill., on another railroad, about 3 miles north of the Belt, and $1.075 in truck at the river. Since the Belt bid is f.o.b. freight car, an adjustment to eliminate the cost of elevation (averaging 2.5 cents per bushel) would place it 1 cent below the river bid at comparable stages in the transportation chain. There is little evidence that "free" corn moves by rail on other than the Belt line from stations between the Belt and the river. The Kernan bid less the cost of elevation would net the farmer $1.02⅜ in truck at Kernan. The river bid less the 2¾-cent truck rate to the river would net the farmer $1.04¼ in truck at Kernan.

[*] The effectiveness of the proposed rate was enjoined from August 28, 1957, to November 24, 1957.

The Farmers Grain Dealers Association of Illinois and the Illinois Grain Dealer's association, each of which has a membership of approximately 300 country elevators with facilities at about 400 rail stations in Illinois, ask for the restoration of the former competitive position among their members. It is their position that the rate from one station on one railroad must be competitive with the rate from another station on another railroad; that such rail rates should be competitive with other modes of transportation; and that such fourth-section relief as may be necessary should be granted to enable the railroads to compete with Illinois River barge lines.

Opposed to any fourth-section relief is the Indiana Farm Bureau Cooperative Association, a federated cooperative of about 93 associations with a total membership, mostly farmers, of about 180,000. It is a member of both the Board of Trade of the city of Chicago which opposes, and the Indianapolis Board of Trade, Inc., which supports, the application. It operates a 5.5 million bushel elevator on the New York Central at Indianapolis, Ind., and a 2.5 million bushel elevator in Louisville, Ky. It handles about 25 million bushels of corn annually, a large part of which is marketed in official territory. Among its 150 to 200 Indiana shipping points are stations intermediate from Kankakee to eastern destinations on the New York Central from which the rates on milled-in-transit corn to those destinations are as much as 10 cents higher than the proposed rates. Combination rates on corn via barge to Chicago thence by rail to these destinations are lower than the local rates from intermediate Indiana destinations and are applicable over Kankakee as well as Chicago. Shifting some of the Belt corn from barge to rail, which is the effect of the proposed rates, would not alter the present competitive relationship at eastern markets between it and Indiana corn.

In its study of the competitive situation, the New York Central made inquiries of corn processors at Kankakee, Paris, and Danville, Ill., and Indianapolis, Ind., as well as country elevators on the Belt. Three of the processors, General Foods Corporation at Kankakee, Illinois Cereal Mills at Paris, and Evans Milling Company at Indianapolis, support the proposed rate. Until the effectiveness of the proposed rate, the corn purchases of General Foods in the northern Illinois territory for rail delivery amounted to about 1.5 carloads a week. After the proposed rate became effective, it received 1,101 carloads during the first 8 months of 1957. In the same period, Illinois Cereal and Evans Milling received 327 and 219 carloads, respectively, from Belt origins. Immediately prior to 1957, Illinois Cereal received only two carloads in 3 years, and Evans Milling did not receive any cars in 15 years, from Belt origins. Of the 1,915 cars of corn originating on the Belt in the first 6 months of 1957,

1,226 cars, reflecting 70 percent of the total, were destined to Kankakee, Indianapolis, Paris, and Danville, and 548 to Chicago. Practically all, if not all, the 1,226 cars consisted of "free" corn on which the proposed rate would apply, while to Chicago, 31 cars were of "free" corn taking the proposed rate, and 517 were Commodity Credit Corporation corn to which the proposed rate would not apply. From the Belt origins to Chicago, the "free" corn movement aggregated 270 carloads in the 12-month period ended October 20, 1956, and 45 cars in the same period a year later.

According to General Foods Corporation, the proposed rate has enabled rail buyers to bid for corn in the country market in competition with river buyers, but a difference in the price which would be offered to the farmer still exists in favor of the river subterminal elevators. It computes differences of 9.93 and 0.63 cents a bushel before and after the effectiveness of the proposed rate, respectively. To determine the prices which could be offered to the farmer at the river elevator at Morris, Ill., and at the country elevator at Blair, Ill., it used a Chicago market price of $1.15 a bushel, from which it subtracted costs of 14.32 cents[4] a bushel on rail originations prior to the proposed rate, leaving $1.0068 a bushel as the amount which could be offered to the farmer at the country elevator; 5.67 cents[5] a bushel on rail originations since the effectiveness of the proposed rate leaving $1.0933 a bushel as the amount which could be offered to the farmer at the country elevator; and 5.04 cents[6] a bushel on river originations leaving $1.0996 a bushel as the amount which could be offered to the farmer at the river elevator.

Based on the actual daily bids at five Belt points and five river points during the 7-month period ended July 31, 1957, the Belt bids averaged 2.02 cents a bushel higher than the river bids. The belt bids, however, were f.o.b. rail car, after elevation; while the river bids were f.o.b. trucks, prior to elevation into barges. By adjusting the bids to a similar basis for comparison, the river bids are seen to be higher on the average than the rail bids.

The record indicates that the use of different moisture discount scales brings about different levels in bids, thus complicating the price picture and making it difficult to determine what the ultimate price paid will be under each scale. General Food's bids were on

[4] Reflects the proportional rail rate from Blair to Chicago of 20.5 cents and 3 percent tax converted to 11.32 cents a bushel plus country elevator handling of 2.5 cents a bushel.

[5] Reflects the proposed rate from Blair to Kankakee of 5.5 cents and 3 percent Federal tax converted to 3.17 cents a bushel, plus country elevator handling of 2.5 cents a bushel.

[6] Reflects the barge rate from Morris to Chicago of 4.4 cents and 3 percent Federal tax converted to 2.54 cents a bushel, plus elevation at river of 1.5 cents a bushel (2.69 cents per 100 pounds) and country elevator markup of .1 cent a bushel.

moisture discounts of 1 cent a bushel for each 0.5 percent of moisture ranging from 13.5 to 20 percent. There is testimony to the effect that these other scales are in use at Chicago and other markets, but there is no evidence that the river and Belt bids actually compared were on different scales so as to require any adjustment.

The cost of trucking from farm to river elevator on barge movements offsets the cost of trucking from farm to Belt elevator on rail movements. It is borne by the farmer in either case. If he were located equidistant from a river elevator and a Belt elevator, he could truck to either at equal cost. The same would hold true for a country elevator operator trucking corn which previously had moved from the farms to his elevator. The protestants contend that it costs more to truck corn from the farm to the river than to the Belt because river elevators are up to 40 miles from the farms and for-hire trucks are usually employed, while country elevators are generally within 8 miles of the farms, and farmer-owned transportation facilities are used. The logic of this contention is elusive. From the midway point the cost of getting the corn to the river or to the Belt would be the same whether the shipper, either the farmer or elevator operator, hired or furnished his transportation. From points north or south of the midway position, shippers would enjoy offsetting geographical advantages as to movement toward the river and the Belt, respectively.

Cargill Incorporated, Illinois Grain Corporation, and Glidden Company compare barge shipper costs of 18.5,[9] 17.7,[10] and 18 cents[11] per 100 pounds, respectively, with the proposed rate of 5.5 cents, and assert that these barge costs make no provision for insurance, shipper preference for country run unmixed corn, and the usual water-carrier disabilities such as weather conditions and added handling. This comparison is not valid in that barge-shipper costs are inflated, at least to the extent that they include cost of trucking to, and elevation at, the river. The more valid comparison is that of the bids, properly adjusted as previously herein described. The bids are predicated on the market price at Chicago, the purchaser's requirements, and

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[9] Includes trucking from Hiawatha, Ill., country elevator to Ottawa, Ill., river elevator of 5.36 cents, transfer truck to barge of 2.66 cents, barge rate Ottawa to Chicago of 4.95 cents, stevedoring at Chicago of 1.15 cents, transfer barge to rail at Chicago of 4.01 cents, and outbound inspection of 0.45 cent.

[10] Includes trucking from Dwight, Ill., country elevator to Morris, Ill., river elevator of 5.4 cents, transfer truck to barge of 2.7 cents, barge rate Morris to Chicago of 4.6 cents, and stevedoring and transfer barge to rail at Chicago of 5.2 cents.

[11] Includes nominal trucking from country elevator to Seneca, Ill., river elevator of 3 cents a bushel, transfer truck to barge of 1.5 cents a bushel, barge rate Seneca to Chicago of 3.63 cents a bushel, stevedoring at Chicago of 0.75 cent a bushel, and transfer barge to rail at Chicago of 2.52 cents a bushel, a total of 10.13 cents a bushel or 18 cents per 100 pounds.

the cost of transportation to Chicago from the points where the bid is made.

The Board of Trade of the city of Chicago, though contending that the proposed rate is too low, expresses doubt that an inbound rail proportional of 18 cents based upon the barge movement costs to the shipper as submitted by the river elevators, would enable applicants to meet the barge competition. Since price is a controlling factor in the shipper selection of the transportation mode, it believes that an equitable basis would be one predicated upon the pricing of the corn at the river elevator and on the Belt. Based upon the average difference of 2 cents a bushel in the rail corn bid on the Belt over the barge corn bid at the river and the trucking charges ranging from 2 to 4 cents a bushel from country elevators to river elevators, the proposed inbound proportional, according to the Chicago Board of Trade, would be lower than competitively necessary from Belt points in the 2, 2.5, 3, 3.5, and 4 cents a bushel trucking zones by amounts of 7, 8, 9, 10, and 10.5 cents per 100 pounds, respectively. By subtracting these amounts from the Belt bids, and trucking charges from the river bids, the Belt and river average bids for the 7-month period ended July 31, 1957, would be approximately the same, differing only from 0.02 to 0.2 cents a bushel. Increases, from 7 to 10.5 cents depending upon the trucking zone, would produce inbound proportional rates ranging from 12.5 to 16 cents. The 12.5-cent rate so adjusted would apply from Belt points nearest the river and most affected by barge competition, but most distant to Kankakee, and the 16-cent adjusted rate would apply from points most distant to the river and least affected by the competition, but nearest to Kankakee. Both the simple averages of 46.4 miles and weighted average distance of 38.3 miles based upon the corn movements on the Belt during the first 6 months of 1957, from the Belt points to Kankakee, are in the 3 cents a bushel trucking zone. The adjusted rate from Belt points in that zone would be 14.5 cents, and the Chicago Board of Trade is of the opinion that the Belt points should be blanketed with this rate because the points are so treated now, and the river prices at the most competitive river elevators, Spring Valley to Morris, are blanketed. This elaborate Chicago Board of Trade proposal is defective in that it begins with the erroneous premise that the Belt bids during the comparison period were higher than river bids, when, in fact, they were not, since they applied to corn at different levels in the transportation chain. Moreover, it contemplates a situation in which shippers by barge can favorably compete with shippers by rail at points on the Belt and permits the railroad to enjoy its geographical advantage only as to corn grown south of the Belt.

Applicants submitted no cost data, but rely on comparative earnings, rate levels, and operating conditions as indicative of the competitiveness of the proposed rate.

During the 9-month period ended August 31, 1957, the corn and corn products movement of the General Foods Corporation yielded average revenues of $60.07 per car, 110,078 pounds, and $1.065 per car-mile for 59.21 miles, from Belt origins to Kankakee; $403.23 per car, 61,775 pounds, and 47.7 cents per car-mile for 845.7 miles, from Kankakee to eastern destinations; and $440.43 per car and 50.9 cents per car-mile for 864.7 miles, from Belt origins to eastern destinations. In the same period, the movement of Evans Milling Company yielded average revenues of $39.42 per car, 109,197 pounds, and $2.36 per car-mile for 24.05 miles, from Belt origins to Kankakee; and $407.36 per car, and 61.62 cents per car-mile from Belt origins to eastern destinations, including Ohio via Kankakee and Indianapolis. The proposed rates did not apply to Ohio destinations during the period, and, excluding such shipments, the car-mile earnings averaged 51.09 cents. For 1955, the average revenues of the New York Central were 40.015 cents per car-mile for its average haul of 236.58 miles. Between 1948 and 1956, inclusive, the average railroad revenue from corn ranged from 73 to 95 cents per short line car-mile. On the products of agriculture, earnings ranged from 42 to 48 cents and on selected grain and grain products (including corn and corn products) 67 to 71 cents. Distances on which the study producing these figures was based were not shown. Actual distances would produce lower earnings, but in many instances actual mileages are close to short-line mileages.

The proposed combinations from Belt origins to 18 representative destinations via Kankakee, and the reshipping rates from Chicago to eastern destinations, reflect averages of 14.4 and 18.1 percent, respectively, of the docket 28300 first-class rates. On ex-lake grain, from Buffalo and Oswego, N.Y., and Erie, Pa., to tidewater ports, applicants maintain export proportional rates which range from 6.8 to 9.5 percent of the same first-class rates. Also, from certain Belt origins to New York City and Boston, Mass., applicants maintain export rates on grain which are lower than the combination of proportionals over Kankakee. For example, from Dwight, the combination domestic rates are 59.5 and 61.5 cents to New York City and Boston, respectively, and the export rate is 54.5 cents to both ports.

The operating distance of the New York Central from Chicago to Kankakee is 75 miles compared with the weighted average distance of 88.3 miles from Belt points to Kankakee. The aggregate distances from Belt to Kankakee via truck to the river, thence barge to Chicago, and thence the New York Central to Kankakee exceeded

by 185 to 797 percent the distance from Belt points to Kankakee, and to certain eastern destinations. The distances from Chicago via Kankakee exceeded by 3.73 to 20.61 percent the distances from Belt points via Kankakee. The line of another carrier, the Illinois Central Railroad Company, from Chicago to Kankakee is more direct than that of the New York Central. The proposed rates apply from Belt points to eastern destinations via either Kankakee or Chicago.

The switching of loaded and empty grain cars from and to terminal elevators at Chicago for the transportation of corn to Kankakee, Indianapolis, Paris, and Danville by the New York Central is more complex than its handling of cars at Belt origins for movement to the same destinations. Switching charges absorbed by the New York Central on corn from Chicago to Kankakee during 9 months in 1956 averaged about 9 cents per 100 pounds. Avoidance of this cost item and the shorter weighted average distance from Belt points as compared to the distance from Chicago to Kankakee support the New York Central's contention that handling corn from the Belt points is less expensive than from Chicago. Further support lies in the fact that no additional trains or power units were needed to handle the increased corn traffic from the Belt points, since the regular trains drop off the empties when westbound and pick up the loaded cars when eastbound. The exact extent to which handling is less expensive on the Belt than at Chicago is not shown.

The New York Central, for its haul from Chicago to Kankakee, assesses the local rate, but upon transit it is credited to the Chicago reshipping rate applicable via Kankakee, out of which it was required to absorb switching charges. At the proposed rate, it receives after transit the full amount of the proposed inbound proportional rate of 5.5 cents for its haul from Belt origins to Kankakee, and avoids the Chicago switching absorption. Thus by handling traffic at the proposed rate, its revenues are increased by 7.5 cents per 100 pounds over its previous handling, and its expenses are reduced in accordance with the reduction in miles from the 75 between Chicago and Kankakee to the lesser weighted average distance of 38.3 miles from Belt points to Kankakee.

The protestants submitted a study of the system average costs [12] of the New York Central and the territorial average costs [13] of the eastern district railroads. On the average 55-ton load, the out-of-pocket costs of the New York Central and the eastern district rail-

[12] Based upon an application of cost formula Rail Form A of the Commission's section of cost finding.

[13] From our cost finding section statement No. 1-57 applying Rail Form A to expenses of the eastern district railroads, adjusted to reflect current levels.

roads are 8.50 and 8.57 cents per 100 pounds, respectively, for the weighted average distance of 98.3 miles. On minimum loads of 50 tons and for the simple average distance of 46.4 miles, the out-of-pocket costs range up to 8.60 cents per 100 pounds.

This study is intended to show that the proposed proportional rates to Kankakee are noncompensatory. It fails in this purpose, primarily because it deals only with the inbound proportional. That rate factor has no independent existence, but is an integral part of the rate which applies on the through transportation from Belt origin, through the milling-in-transit point, to delivery of the corn product at its ultimate destination. Moreover, it is only by application of the through combination that the fourth-section departures subject of this proceeding are created.

Applicants point out that, since rates from each origin to each ultimate destination could be filed as single factor rates (and be no more compensatory than under the present publication), condemnation based on finding the inbound proportional only to be noncompensatory would be tantamount to condemnation arising out of the method of publication.

The authorities cited by the protestants in support of their contention that the issue here concerns a separate component of through rates for the future the lawfulness of which may be passed on independently of the other components, are not helpful here. *Great Northern Ry. Co.* v. *Sullivan*, 294 *U.S.* 458, was a section 1 case holding that the through rate must be shown to be unreasonable in order to support a reparation award. *Atchison, T. & S.F. Ry. Co.* v. *United States*, 279 U.S. 768, condemned a railroad's attempt to increase a local rate to a transit point after the traffic was shipped out of that point by another railroad. *Cairo Board of Trade* v. *Cleveland, C., C. & St. L. Ry. Co.*, 46 I.C.C. 343, so far as is pertinent, concerned a grain rail center which was unduly prejudiced by the failure of the railroads to accord it reshipping rates comparable to those enjoyed by competitive rail centers. Somewhat similar thereto is *Atlantic Terra Cotta Co.* v. *Atlanta & W.P.R. Co.*, 151 I.C.C. 45.

For 1956, Mechling's operating ratio was 91.9 percent, and its average fully distributed costs for the transportation of corn from the six most competitive ports to Chicago were 11.4 mills and 87.93 cents per ton or 4.4 cents per 100 pounds. These expenses are about 10 cents less than the New York Central's average fully distributed costs of 14.33 and 13.57 per 100 pounds on 50-ton and 55-ton loads, respectively, for 46.4 miles, computed by protestants. According to Mechling, this difference of approximately 10 cents represents its inherent low cost advantage which must be preserved. The barge carrier is not entitled under the act to have its rates protected from

a competing mode of transportation, where, as in this instance, the railroad's efforts to secure traffic do not amount to a destructive competitive practice.

The Chicago Board of Trade and others raise certain issues, principally discrimination against whole corn by the milling-in-transit limitation; discrimination against Chicago by the proposed rate combination applying over Kankakee when prior thereto rates to the East were made over Chicago; undue preference to the processors of corn by the limitations in the application of the proposed rate to commodities shipped by these processors; and unreasonable routes on the proposed rate combination by the restrictive routes which apply over Kankakee in movements to eastern destinations. Although the New York Central intends to remove the milling-in-transit limitation, these issues do not directly deal with the fourth-section principles here involved, but are properly matters which may be raised in investigation or complaint proceedings. However, since the proposed rates are effective over Chicago, that point has the same stature as all other corn-processing points in official territory in their application. Moreover, the routes over Kankakee are the same as they were for many years prior to the establishment of the proposed rates, and, while limited in their scope as compared to making the inbound rate break on Chicago, there is no indication of undue damage to Chicago.

It is clear that the competitive situation which prevailed prior to the proposed rate between the all-rail and the barge-rail rates on corn from the northern Illinois territory to the East required an adjustment in the all-rail rates, and that such an adjustment requires fourth-section relief. The proposed rates are intended partly to remedy the situation, and the instant application seeks the relief to cover the departures which occur. Before such relief may be granted, applicants must show that the proposed rates are reasonably compensory and no lower than necessary to meet the competition.

The country elevators in the area were originally set up to do business over all-rail routes, and yet, prior to the proposed rate, the preponderant portion of their business was over barge-rail routes. Except for the handling of Government-controlled corn shipped at export rates (which are lower than those in issue), these elevators were relegated, for the most part, to such operation as was necessary to process corn for retail locally, while the elevator operators took on the function of merchandisers employed at taking the corn off the farmers' hands and marketing it at the river. After the proposed rate went into effect, this pattern was changed. Elevators on the Belt discontinued their merchandising business with the subterminal river elevators and returned to their former role as rail elevators.

Of the elevators closer to the Belt than to the river, but which had no facilities on the New York Central, some set up portable equipment on the Belt, while others experienced reductions and face possible elimination of their business in corn for river shipment. This is to be expected in making the all-rail route competitive with the barge-rail route.

Some diversion of traffic must necessarily result in redeveloping a rail movement of corn from the area contiguous to the rail line, and to that extent the barge movement and the business of those connected therewith will be adversely affected. An example of how the competitive situation was altered is seen in the case of the country elevator at Grand Ridge, Ill., which lost some business from farms located between it and the Belt elevator at Streator, 8 miles to the south, but lost no business from farms lying between it and the river elevator at Ottawa, 9 miles to the north. Another country elevator operator at Marseilles, Ill., north of the river, felt no adverse effects from the operation of the proposed rates, notwithstanding that his area of business extends south of the river to within 8 miles of the Belt. Even though he lost some customers, he gained others. It is interesting to note that though this operator was located on a line of the Chicago, Rock Island and Pacific Railroad Company, he had no facilities for rail loading because, as he related, there is no incentive to ship by rail, the river rate being what it is.

At the same time the 10 competitive river ports, notwithstanding their loss of traffic to the Belt, increased their shipments of corn to Chicago from 402,105 tons in the period December 15, 1955, to August 30, 1956, to 493,692 tons in the corresponding period the following year during which time the proposed rates were in effect. It is apparent that while corn grown adjacent to the Belt was attracted to the rails, that grown adjacent to the river remained with the barges. Thus, it is evident that the proposed rates are not lower than necessary to meet the barge competition.

The rate and revenue comparisons and cost-saving evidence submitted by the New York Central and its supporters establish the compensativeness of the proposed rates.

We find, upon the record herein, that applicants have shown a special case within the meaning of section 4 of the act, by virtue of actual and compelling competition; that the proposed rates are not lower than necessary to meet that competition, do not constitute a destructive competitive practice, are reasonably compensatory, and will not impose an undue burden on other traffic; and that the relief sought would not be disharmonious with the other provisions of the act, would be in the public interest, and is justified.

A fourth-section order granting the relief sought will be entered.

310 I.C.C.

U.S. GOVERNMENT PRINTING OFFICE: 1960

APPENDIX D

Fourth Section Order No. 19346

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, held at its office in Washington, D.C., on the 8th day of June, A.D. 1960.

CORN AND CORN PRODUCTS, ILLINOIS TO OFFICIAL TERRITORY

By fourth-section application No. 33955, as amended, carriers parties to the New York Central Railroad Company tariff I.C.C. No. 1169 and Agent H. R. Hinsch's tariff I.C.C. Nos. 4403 and 4499, according as they may participate in the traffic, apply for authority to continue or to establish and maintain the rates hereinafter described without observing the long-and-short-haul provision of section 4 of the Interstate Commerce Act. A hearing having been held, and full investigation of the matters and things involved in said application having been made, and the division, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which application and report are hereby referred to and made a part hereof:

It is ordered, That applicants in No. 33955, as amended, be, and they are hereby, authorized to continue or to establish and maintain over their proposed direct routes, for the transportation of corn products, in carloads, as more fully described in the application, from points in Illinois on that part of the New York Central Railroad Company's Kankakee Belt Line extending from Van's Siding to Moronts, both inclusive, to points in central, trunk-line, and New England territories, rates constructed on the basis de-

scribed in the application, and to maintain higher rates from and to intermediate points; *Provided*, That the rates from and to such higher-rated intermediate points shall not be increased except as may be authorized by this Commission nor exceed the lowest combination of rates subject to the Interstate Commerce Act.

It is further ordered, That all other and further relief prayed by fourth-section application No. 33955, as amended, be, and it is hereby, denied.

The commission does not hereby approve any rates filed under this authority, all such rates being subject to complaint, investigation, and correction if in conflict with any provision of the Interstate Commerce Act.

By the Commission, division 2.

HAROLD D. McCOY,
Secretary.

(SEAL)

APPENDIX E.

INTERSTATE COMMERCE ACT, 24 Stat. 379, as amended [49 U.S.C. § 1 *et seq.*]:

National Transportation Policy [49 U.S.C. preceeding § 1]:

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Section 3(1) [49 U.S.C. § 3(1)]:

> (1) It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect what-

soever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

Section 4(1) [49 U.S.C. § 4(1)]:

(1) It shall be unlawful for any common carrier subject to this part or part III to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this part or part III, but this shall not be construed as authorizing any common carrier within the terms of this part or part III to charge or receive as great compensation for a shorter as for a longer distance: *Provided,* That upon application to the Commission and after investigation, such carrier, in special cases, may be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property, and the Commission may from time to time prescribe the extent to which such designated carriers may be relieved from the operation of the foregoing provisions of this section, but in exercising the authority conferred upon it in this proviso, the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and no such authorization shall be granted on account of merely potential water competition not actually in existence: . . .

Section 13(1) [49 U.S.C. § 13(1)]:

(1) That any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this part, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

APPENDIX F

Representative decisions of the Commission reflecting its historical position that it will not authorize the establishment and maintenance of rates which do not conform to the requirements of section 4 of the Act, if such rates would violate other sections of the Act, particularly sections 2 and 3, are as follows:

> The test which the Commission must now apply to determine whether the carrier may be given the advantage of an exception to the general rule of section four is the same test that it may apply with respect to any other discrimination or inequality. There is incorporated in section four every standard set up by Congress as a guide to this Commission which is to be found in any section of the act. And the leeway or discretion which may properly be exercised by this Commission under any other section may properly be exercised under this section. For instance, it is for us, acting within the limitations of the law, to determine what is a reasonable practice for a common carrier to pursue. This calls for the widest exercise of discretion. And if our judgment is arbitrary, or we transcend those limitations properly binding such a tribunal, our act may be set aside. • • •
>
> The Commission has not been left without a proper test to apply: The test of justness, of reasonableness, of discrimination, of preference and advantage; the test of fair play as between communities. With this construction of the statute, which is historically supported, as well as by those more or less variable measures known as the canons of statutory construction, the statute becomes both practicable and constitutional; we are neither forced to disregard it as a whole nor to eliminate any of its provisions; it does not become an absolute long-and-short-haul section, because the proviso permitting of exceptions remains; the provi-

sional clause does not relegate the entire section to the limbo of unconstitutionality, because we find that it may be administered in thorough harmony with the whole act, part of which it is; and the tests and standards to be applied are not matters of fancy, but are the express and positive words in the law itself. In short, Congress has undertaken to specify distinctly one practice which it wishes especially to destroy and charges this Commission not to permit it to obtain unless such discrimination, such preference, such practice may be shown not to be a discrimination that is unjust, a preference that is undue, or a practice that is unreasonable, because of peculiar facts and conditions. *Railroad Commission of Nevada* v. *S. P. Co.*, 21 I.C.C. 329, 338-339.

* * *

To paraphrase the language of the Supreme Court, in the exercise of a sound legal discretion we may grant permission to charge higher rates at the intermediate points upon the ground that such rates are part of an established group adjustment, if we are satisfied that this is compatible "with a due consideration of the private and public interests concerned and in view of the preference and discrimination clauses of the second and third section," and, no doubt, of the provisions of the first section also. *Commodity Rates On Lumber and Other Forest Products, In Carloads, From South Pacific Coast Territory To Points In Central Freight Association Territory*, 165 I.C.C. 561, 569.

* * *

It is well settled that we will not authorize fourth-section relief where the proposed rate structure would create infractions of other provisions of the act. Thus, where any doubt appears, the burden is upon applicants to show that the proposed rate structure would not result in any unlawful situations. *Bituminous Coal To Buffalo, N. Y.*, 219 I.C.C. 554, 560.

* * *

It is well settled that sections 3 and 4 should be so construed as to cause them to operate harmoniously. *Differential Routes To Central Territory*, 211 I.C.C. 403, 421.

* * *

Water competition has long been recognized as creating a special case in which relief may be granted from the provisions of section 4. *Intermountain Rate Cases*, 234 U.S. 476. However, the relief from that section cannot be granted to establish rates that may be in violation of other sections of the act. *Pig Iron To Butler, Pa.*, 222 I.C.C. 1, 2.

* * *

Our authority to grant relief from the provisions of section 4 is limited to "special cases." A special case which might justify fourth-section departures upon grounds of market or other competitive conditions, contemplates that such departures will not result in violations of other provisions of the act, particularly section 3. On this record, we conclude that applicants have failed to sustain the burden which rests upon them to prove that the proposed rates would not create infractions of provisions of the act other than section 4. In the circumstances, we find that sufficient justification has not been shown to warrant the approval of the relief sought. Accordingly, the application will be denied. An appropriate order will be entered. *Iron and Steel To Minnesota*, 231 I.C.C. 425, 428.

* * *

The record contains uncontradicted evidence submitted on behalf of the Chicago intervener that the reduction of the rates from Janesville to Evanston, and not to points in the Chicago district, would unduly prefer the Evanston dealer and unduly prejudice Chicago dealers in competing for business both in Evanston and in the Chicago district.

We find that sufficient justification for the relief prayed by this application No. 17453 has not been

presented, and accordingly it will be denied. *Sand and Gravel to Northfield and Evanston, Ill.*, 234 I.C.C. 65, 68.

* * *

In the administration of section 4 of the act, the Commission has adopted the view that relief from the provisions thereof should be granted where necessary to enable a carrier to retain or secure traffic which otherwise would move over another route, provided the rates established for that purpose do not conflict with other provisions of the act, and are not contrary to the public interest. *Coal and Coal Briquets in the South*, 289 I.C.C. 341, 376-377.

* * *

It goes without saying that carriers should not propose rates or rate structures for approval in a fourth-section application which create infractions of other provisions of the interstate commerce act, and particularly of section 3. *Transcontinental Cases of 1922*, 74 I.C.C. 48, 71.

* * *

When fourth-section relief is granted it should be compatible with the affected interests and with the provisions of the Interstate Commerce Act. *Passenger Fares, Hell Gate Bridge Route, New York, N. Y.*, 296 I.C.C. 147, 153.

* * *

The protestant meets the same competition at Lake Charles that is encountered by the grinders at Houston and Corpus Christi. The evidence is convincing that the proposed rate would result in undue prejudice to the protestant and in undue preference of shippers and receivers under the proposed rate.

In view of the conclusion reached with respect to the proposed schedules, a further discussion of the fourth-section application is unnecessary. *Crude Barytes Ore from Missouri to Corpus Christi and Houston*, 299 I.C.C. 505, 508.

* * *

It is clear that the suspended rates would result in violations of section 3 of the act. In their brief, the western trunk-line respondents suggest that such situations should be handled in separate proceedings. Ordinarily, adjustments which invite further controversy must be viewed with disfavor.

We find that the proposed rates have not been shown to be just and reasonable, and that they would result in violations of section 3 of the act. An order will be entered requiring their cancellation and discontinuing the proceedings. The fourth-section applications will be denied. *Iron and Steel from Minnequa to Kansas, Nebraska, and South Dakota*, 278 I.C.C. 163, 168-169.

* * *

The rail carriers have the right to meet competition in whatever form it may arise, provided that the rates do not contravene any provision of the act, and we may, subject to certain conditions, grant relief from the operation of the long-and-short-haul provision of section 4 of the act with respect to such rates. The first part of section 4(1) of the act is devoted to expressing the general prohibition against charging more for a shorter than for a longer haul over the same line or route, the shorter being included in the longer distance, and also against charging greater compensation as a through rate than the aggregate of intermediate rates. However, as indicated, it is within our power to relieve the carriers from the operation of this general prohibition, upon application by them and investigation of the matter by us, but only in special cases and only after finding that the charge to the more distant point is reasonably compensatory for the service performed.

The first question to be resolved is whether the situation presented falls within the category of a special case. Competition has always been the principal "special case" which we have recognized in granting relief.

Although this be true, the existence of competition does not *ipso facto* entitle an applicant to relief. The competition relied upon must always be examined in relation to the existing circumstances, bearing in mind that we cannot grant relief from the long-and-short-haul provision to establish rates that may be in violation of other sections of the act, in particular sections 2 and 3. See *Intermountain Rate Cases*, 234 U. S. 476. *Nepheline Syenite from Ontario, Canada, to the East*, 308 I.C.C. 561, 564-565.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

A. L. MECHLING BARGE LINES, INC., ET AL.,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Defendants-Appellees.

BOARD OF TRADE OF CITY OF CHICAGO,
Appellant,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and THE NEW YORK CENTRAL RAILROAD COMPANY, ET AL.
Appellees.

On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

MOTION TO AFFIRM

RICHARD J. MURPHY
1225 LaSalle Street Station
Chicago 5, Illinois
Attorney for The New York Central Railroad Company, Appellee

Dated: March 5, 1963.

McCORMICK & HENDERSON INC., CHICAGO, ILL.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 746

A. L. MECHLING BARGE LINES, INC., ET AL.,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Defendants-Appellees.

No. 747

BOARD OF TRADE OF CITY OF CHICAGO,

Appellant,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and THE NEW YORK CENTRAL RAILROAD COMPANY, ET AL.

Appellees.

On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, The New York Central Railroad Company, an applicant in the proceeding before the Interstate Commerce Commission (sometimes hereinafter referred to as the "Commission")[1], and an intervenor-as-defendant in the Court proceeding below, moves that the judgment of the District Court be affirmed.

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[1] Likewise the Interstate Commerce Act (49 U.S.C., National Transportation Policy [Preceding Sections 1, 301, 901, 1001], §§1, *et seq.*, is sometimes hereinafter referred to as the "Act".)

STATEMENT

This case involves the validity of an order of the Interstate Commerce Commission in Fourth Section Application No. 33955, *Corn and Corn Products, Illinois to Official Territory*, 310 I.C.C. 437, petitions for reconsideration denied by entire Commission November 18, 1960. The order was entered after hearing[2] in which the Commission authorized railroads to depart from the long and short haul provision of Section 4 of the Interstate Commerce Act. The Commission's notice of hearing issued October 16, 1957, and setting the matter for hearing on December 4, 1957, specifically stated that the hearing would be held on the railroads' Fourth Section Application No. 33955. A copy of the notice of hearing is attached hereto as Appendix A. On four prior occasions, in August 1957, the Commission notified Appellants that the lawfulness of the rates under other sections of the Act would be determined by the Commission in an investigation if a complaint were filed in accordance with the Commission's Rules of Practice. Copies of these notices are attached as Appendix B. Appellants did not file complaints assailing the lawfulness of the rates pursuant to the Commission's rules and the Commission's advice as to their rights. If Appellants had filed such complaints prior to the hearing they would have been consolidated for hearing and determination with the railroads' fourth section application as it is the Commission's policy to determine all issues in one proceeding if those issues are prop-

[2] As the fourth section order assailed here was entered after notice, hearing and oral argument, and is based on findings, the questions involved in *A. L. Mechling Barge Lines, Inc.* v. *United States*, 368 U.S. 324 (1961) are not present here.

erly raised. *Mississippi Railroad Commission* v. *Alabama & V. Ry. Co.*, 120 I.C.C. 569, 573 (1927). The fourth section order assailed here includes the following provision that for many years has been included in all fourth section orders entered by the Commission:[3]

> "The Commission does not hereby approve any rates filed under this authority, all such rates being subject to complaint, investigation, and correction if in conflict with any provisions of the Interstate Commerce Act."

The fourth section application was filed to enable The New York Central Railroad Company to maintain rates that would permit the rail movement of corn from stations in northern Illinois located on its Kankakee Belt Line west of Kankakee, Ill., to destinations in the east in competition with the barge-rail route via the Illinois River to Chicago, Ill., and at the same time avoid reducing rates and revenues on corn originated at intermediate origins east of Kankakee at which there was no competition. This situation, namely the meeting of the competition of other carriers for particular traffic, most frequently is the basis for the granting of fourth section relief. Such relief has the effect of enabling applicants to compete with other carriers while leaving the rate structure basically unaltered.

Prior to the publication of competitive rates corn was trucked from farms adjacent to the line of the New York Central west of Kankakee to river elevators and Central's Line was left almost barren of traffic and revenues. The record before the Commission contained evidence of the barge movement of corn via the Illinois River to Chicago

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[3] See the Commission order quoted in *Intermountain Rate Cases*, 234, U.S. 476, 493 (1914).

and rail shipments of corn from the Kankakee Belt stations involved both prior and subsequent to the publication of the competitive rates on December 15, 1956. The following table shows the movement figures:

	Barge Receipts At Chicago (Bushels)	Barge Shipments From 10 Competitive Ports to Chicago[4] (Bushels)	Rail Shipments From Kankakee Belt Stations (Bushels)
1935	723,000	Not Available	Not Available
1937	2,019,000	Not Available	Not Available
194[illegible]	16,266,000	Not Available	Not Available
1956	26,210,000	24,647,000[5]	926,000
1957	34,199,000	27,833,000[6]	5,362,000

The rail movement during 1956 was almost entirely corn for export that moved on rates that were lower than the through rates involved here. More than 1,000,000 of the 5,362,000 bushels shipped by rail in 1957 moved on the lower export rates. The barge lines remained the overwhelmingly dominant factor in the movement of corn from the Kankakee Belt Territory after the competitive rates became effective. By the ultimate test of the competitive effect of the rates, as well as other evidence on the competitive issue, the Commission found that the rates are not lower than necessary to meet barge competition (310 I.C.C. at p. 452).

[4] The 10 ports on the Illinois River that are competitive with the Kankakee Belt are Lockport, Joliet, Morris, Seneca, Ottawa, La-Salle, Spring Valley, Hennepin, Henry and Lacon.

[5] 11 month period December 15, 1955 to November 11, 1956 projected on an annual basis.

[6] 11 month period December 15, 1956 to November 11, 1957, projected on an annual basis.

As the river route to Chicago had a practical monopoly on the movement of corn from the origin area west of Kankakee, it was only to be expected that, even though the reduced rates could be used on rail movements via Chicago, appellants as parties interested in the barge route would oppose competitive efforts which permitted the corn to move via all-rail routes. The establishment of all-rail rates competitive with the barge-rail rates permitted buyers of corn for shipment by rail to compete with river buyers for the purchase of corn. The Commission found that the bidding competition made possible by the competitive rail rates benefited the farmer through higher prices (310 I.C.C. at 442).

Grain and grain products move on a system of combinations either of flat[7] rates to reshipping points plus proportional rates beyond to destination, or of proportional rates to reshipping points plus proportional rates[8] beyond to destination.

Inasmuch as the proportional rates from both Chicago and Kankakee to the east are identical, the New York Central elected to meet the competition of the barge-rail route by establishing a proportional rate factor to Kankakee competitive with the barge rates to Chicago. Thus the combinations of the proportional rail rates via Kankakee would be competitive with the combinations of the barge rates to Chicago plus the proportional rail rates beyond. No change was made in the proportional rates from either Kankakee or Chicago.

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[7] A flat rate is one of unrestricted application and is not dependent on prior or subsequent transportation.

[8] A proportional rate is of restricted application applicable only on traffic having prior or subsequent transportation and is only a portion of the total transportation charges.

As the flat rates from both Kankakee and Chicago to eastern destinations are the same and are higher than the combination of the barge rate to Chicago and the proportional rate from Chicago to the same destinations, the permissive fourth section relief granted by the Commission in respect to the Kankakee combinations authorizes the same departures from the long-and-short haul provision of the Act as exist in connection with the barge-rail combination rates over Chicago.

The rate application is as follows. In the first instance the corn is moved from origin stations on the New York Central west of Kankakee to Kankakee, Chicago, Paris, or Danville, Illinois; Indianapolis, Indiana; or other transit points under higher flat rates. After milling in transit and reshipment of corn products, the inbound charges are readjusted on the basis of the combination of the proportional factor to Kankakee and the proportional rates on grain products from Kankakee, and the credit is applied to the outbound movement of corn products. The Commission found that the 6 cent proportional factor from stations west of Kankakee to Kankakee "has no independent application but is an integral part of the rate which applies on the through transportation from origin to delivery of corn products at ultimate destination", and that "it is only by application of the through combination that the fourth-section departures subject of this proceeding are created." (310 I.C.C. at p. 450). Its only function is the determination of the through charges.

The Chicago Board of Trade, (J.S., p. 6) presents a series of charts to show the rate application from Streator, Ill. to New York, N.Y. The New York Central had no movement of corn from Streator during the years 1954-1956. Thus the 72.5 cent rate applicable prior to December 15, 1956 was of no practical significance. It should be

recognized that Charts II and III do not show the combination of the barge-rail rates via Chicago. The barge rate to Chicago was 4.625 cents on December 15, 1956 (310 I.C.C. at 440) which, when added to the reshipping rate of 49.5 cents from Chicago to New York, produced total charges of 54.125 cents per hundred pounds via the barge-rail route over Chicago as contrasted with the 54.5 cent rail combination via Kankakee. Moreover, the rail combination over Kankakee applies via Chicago and corn moving on that combination can be stored in transit or milled in transit at Chicago or stations east thereof en-route to final destination.

The Commission granted the railroads' fourth section application by order entered June 8, 1960, its ultimate finding being:

> "We find, upon the record herein, that applicants have shown a special case within the meaning of section 4 of the Act, by virtue of actual and compelling competition; that the proposed rates are not lower than necessary to meet that competition, do not constitute a destructive competitive practice, are reasonably compensatory, and will not impose an undue burden on other traffic; and that the relief sought would not be disharmonious with the other provisions of the act, would be in the public interest, and is justified. (310 I.C.C. 452)"

The court below unanimously concluded that the order was within the statutory power of the Commission, that it is supported by findings and conclusions based on substantial evidence, and that no prejudicial error occurred in the hearings before the Examiner and the Commission. Appellants' complaint to enjoin the Commission's fourth-section order was dismissed. The opinion of the District Court is reported at 209 F. Supp. 744.

ARGUMENT.

This appeal presents no substantial question warranting plenary consideration by this Court. The Commission's fourth-section order in question was entered after notice and hearing and is based on findings. No question is raised as to the fairness of the hearing in respect to the fourth-section issues presented by the railroads' application. Rather, the questions presented fall into three categories: (1) Did the Commission correctly determine that the charges were compensatory as required by Section 4 of the Act? (Mechling J.S., pp. 3-4, questions 1-3); (2) Must the Commission make a final determination in respect to the lawfulness of the rates under other sections of the Act in a hearing limited to the railroads' fourth-section application? (Mechling J.S., p. 4, question 4; Board of Trade J.S., p. 3); and (3) Was the Commission's ultimate finding based on requisite findings supported by substantial evidence? (Mechling J.S., p. 4, question 5).

(1) The correctness of the Commission's basic determination of the compensatory issue on consideration of the through or aggregate charges from origins west of Kankakee to destinations in the East is clear from the language of Section 4 of the Act[9] and the cases cited by

[9] "It shall be unlawful for any common carrier subject to this part or part III to charge * * * any greater compensation in the aggregate for the transportation * * * for a shorter than for a longer distance * * * Provided, That * * * carrier(s) * * * may be authorized by the Commission to charge less for longer than for shorter distances * * * but * * * the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; * * *."

the District Court. The statute plainly refers to "greater compensation in the aggregate" and "any charge to or from the more distant point." There was no challenge as to the compensativeness of the through charges from origin to destination. The Commission found that the through charges involved were on a higher level than export rates on corn from the same origins to New York, and on a higher level than other grain rates with which they were compared, (310 I.C.C. at 448); and further found that by handling traffic on the proposed through rates New York Central's revenues are increased by 7.5 cents per hundred pounds and its expenses are reduced by reason of the less expensive handling of corn from stations west of Kankakee than from Chicago (310 I.C.C. at 449). The Commission also found that the rates are not lower than necessary to meet the barge competition (310 I.C.C. at 449) and finally found that, "The rate and revenue comparisons and cost-saving evidence submitted by the New York Central and its supporters established the compensativeness of the proposed rates." (310 I.C.C. at 452). These findings, based on substantial evidence, fully meet the time-honored definition of a reasonably compensatory rate set forth in *Transcontinental Cases of 1922*, 74 I.C.C. 48, 71, which was quoted by the Court below. There is no basis for Mechling's assertions that the rates are non-compensatory as required by Section 4 or that the competitive portion of the rate is subsidized by a non-competitive portion of the rate. The Commission specifically found to the contrary (310 I.C.C. 448-449).

(2) That the Commission is not required to make a final determination in respect to the lawfulness of the rates under other sections of the Act in a hearing limited, as this

one was, to the railroads' fourth section application was decided by this Court in *United States* v. *Merchants & Manufacturers Traffic Association*, 242 U.S. 178 (1916). In that case the Commission had granted fourth section authority. Hearings were held. Thereafter, certain intermediate cities contended that the order was invalid because they had not been heard in the proceedings in which the orders had been entered. This Court stated at 188:

> "• • • For the order is permissive merely. The carrier is the only necessary party to the proceeding under §4. The Commission represents the public. While it is proper and customary for communities or shippers interested to participate in hearings held, there is no provision for notice to them. They are not bound by the order entered; at least in the absence of such participation. And if the rates made by tariffs filed under the authority granted seem to them unreasonable, or unjustly discriminatory, §§13 and 15 afford ample remedy."

This Court in the *Merchants and Manufacturers* case recognized the distinction between the determination of the issues on a fourth section application and a final determination of the lawfulness of the rates filed in conformance with the order. Appellant Board of Trade's distinction of that case on the ground that plaintiffs there were not parties to that Commission proceeding misses the point of that holding. See also *Seatrain Lines, Inc.*, v. *United States*, 168 F.Supp. 819 (N.D. N.Y. 1958) where the Court held at 824:

> "The only questions presented for investigation by the Commission under Section 4 are whether there is a 'special case' and whether the proposed rates are 'reasonably compensatory.'"

• • • • •

> "However, Section 4 does not contemplate that there shall be a determination in a Section 4 proceeding as to whether the rates charged are unduly discriminatory against a competing water carrier. This question must be raised by proceedings under Sections 13 and 15 of the Interstate Commerce Act. In such proceedings a hearing must be held at which all parties affected, carriers, shippers and communities, can be heard and their respective interests appropriately weighed and balanced by the Commission." (p. 824)

The Board of Trade attempts to distinguish *Koppers Company* v. *United States*, 132 F. Supp. 159 (W.D. Pa., 1955) and *Florida Citrus Commission* v. *United States*, 144 F. Supp. 517, 526 (N.D. Fla., 1956) on the ground that those cases were general revenue increase cases which did not involve Section 4 of the Act. As a matter of fact, the Commission's order assailed in the *Koppers* case did modify outstanding fourth section orders so as to permit the railroads to increase rates. However, the real significance of these cases is that there, as here, the Commission's orders did not require or approve the rate action taken by the railroads, but permitted rate changes without making an ultimate determination of the lawfulness of the rates under all sections of the Act. As here, the Courts in each of those cases cited and followed the precedent of this Court in *United States* v. *Merchants & Manufacturers Traffic Association, supra.*

Intermountain Rate Cases, 234 U.S. 476 (1914), cited by appellants and decided prior to *United States* v. *Merchants & Manufacturers Traffic Assn., supra,* does not deal with the question presented here. In that case this Court interpreted Section 4 as amended in 1910, held that it was constitutional, and held that orders of the Commission entered thereunder were reviewable. This Court's discussion of "The meaning of the Statute" at pages 480-

486, makes it clear that its reference to "the preference and discrimination clauses of the second and third section" of the act was to discrimination against or prejudice to intermediate short haul shippers who would be adversely affected by lower long haul rates. At pages 482-483 of that opinion, this court pointed out "* * * that where within the purview of the fourth section it had lawfully resulted that the lesser rate was charged for a longer than for a shorter haul, such exaction being authorized could not be preference or discrimination and therefore illegal." Thus, while that case requires the Commission to find that a special case exists to excuse what otherwise would be discrimination or prejudice to the intermediate short haul shippers, it does not require the Commission to make a final and ultimate determination of the lawfulness of the rates under other sections of the Act. Here the Commission found that a special case exists by virtue of actual and compelling competition and that the proposed rates are not lower than necessary to meet competition (310 I.C.C. at 452); that on the record there is no indication of undue damage to Chicago (310 I.C.C. at 451); and that shifting some of the Belt corn from barge to rail would not alter the competitive relationship at eastern markets between Belt corn and corn grown near Indiana stations intermediate from Kankakee to eastern destinations (310 I.C.C. at 444). Thus the Commission's findings fully conform to the interpretation of Section 4 in *Intermountain Rate Cases, supra.*

Neither the Commission nor the court below held that the Commission is excused from taking cognizance of the national transportation policy and applying the act as a whole as required by *American Trucking Assns. Inc.* v.

United States, 355 U.S. 141 (1957). The Commission's report is replete with discussion of the evidence and contentions of the parties and includes the finding that in this instance the railroads' efforts to secure traffic do not amount to a destructive competitive practice (310 I.C.C. at 451). However, the requirement that the Commission administer the Act consistent with the National Transportation Policy does not demand that the Commission modify its procedures and make specific ultimate findings under sections of the Act other than those under which the proceeding is held.

Appellants argue that the Commission changed its procedures in this case and cite sixteen Commission reports.[10] However, in only two isolated reports was relief denied because other sections of the Act were found to be violated. Those reports, the latest of which was decided in 1939, were by a division of the Commission from which no petition for reconsideration by the entire Commission was filed.[11] The remainder fail since they were (a) not fourth section proceedings;[12] or (b) general investigation proceedings under §15(7) of the Act where the lawfulness of the rates are in issue;[13] or (c) cases in which the relief

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[10] Board of Trade J.S., p. 13, App. F; Mechling J.S., p. 20.

[11] *Iron and Steel to Minnesota*, 231 I.C.C. 425, 428 (1939); *Bituminous Coal to Buffalo, N. Y.*, 219 I.C.C. 554, 560 (1936).

[12] *City of Spokane* v. *Northern Pacific Ry. Co.*, 21 I.C.C. 400, 426, (1911).

[13] *Crude Barytes Ore from Missouri to Corpus Christi and Houston*, 299 I.C.C. 505, 508 (1956); *Passenger Fares, Hell Gate Bridge Route, New York N.Y.*, 296 I.C.C. 147, 153 (1955); *Iron and Steel from Minnequa to Kansas, Nebraska and South Dakota*, 278 I.C.C. 163, 168-169 (1950).

sought was granted;[14] or (d) where a "special case" was found not to exist since discrimination would result at intermediate points;[15] or (e) where the rates were found to be noncompensatory.[16] The Commission's policy and practice was stated by the entire Commission in *Mississippi Railroad Commission* v. *Alabama & V. Ry. supra*, (1937) as follows:

> "* * * It is desirable in the interests of economy of time and expense, wherever practicable, to hear and dispose of fourth-section applications in connection with formal complaints or investigations involving the same rate under other sections of the Act. * * * So far as practicable it will be adhered to in the future * * *."

Moreover, the Commission's practice not to make final determination under the other sections of the Act has been stated in all fourth section orders issued since *Intermountain Rate Cases, supra*, in 1914.

The Board of Trade's assertion that "the effect which the results of the decision will have upon an important segment of the grain-rate structure, of itself, makes this a case of general public importance" and its suggestion

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[14] *Intermountain Rate Cases*, 234 U.S. 476 (1914); *Nepheline Syenite from Ontario, Canada, to the East*, 308 I.C.C. 561, 564-565 (1959); *Coal and Coal Briquets in the South*, 289 I.C.C. 341, 376-377 (1953); *Lumber from the South and Southwest*, 245 I.C.C. 67, 73-74 (1941); *Commodity Rates on Lumber and Other Forest Products, in Carloads, From South Pacific Coast Territory to Points in Central Freight Association Territory*, 165 I.C.C. 561, 569 (1930); *Differential Routes to Central Territory*, 211 I.C.C. 403, 421 (1935); *Railroad Commission of Nevada* v. *S.P. Co.*, 21 I.C.C. 329, 338-339 (1911)

[15] *Sand and Gravel to Northfield and Evanston, Ill.*, 234 I.C.C. 65 (1939); *Pig Iron to Butler, Pa.*, 222 I.C.C. 1 (1937).

[16] *Transcontinental Cases of 1922*, 74 I.C.C. 48 (1922).

that the Kankakee combinations have precipitated other grain rate adjustments which are now before the Commission (J.S., pp. 18-19) are irrelevant to the questions presented. The Commission has and exercises its ample powers to require and preserve a reasonable and lawful rate structure. *New York* v. *United States*, 331 U.S. 284 (1947); *Ayrshire Collieries Corp.* v. *United States*, 335 U.S. 573 (1948). The four pending proceedings referred to by the Board of Trade are investigations instituted by the Commission pursuant to section 15(7) of the Act in which all questions as to the lawfulness of the rates there involved will be determined. While in this case the Commission did not institute a general investigation under section 15(7) into the lawfulness of the proportional factor to Kankakee as requested by appellants, the Commission advised that the rates could be made subject to investigation on complaint under section 13(1) of the Act. Appellants could have filed a complaint in 1957 when the proceeding commenced; in 1960 when the order being assailed was entered; and may still file a complaint. The question of law presented is narrow and technical and of no practical importance in respect to the rate structure. As a matter of administrative procedure it has already been decided by this Court.

(3) The Commission's report is replete with discussion of the contention of the parties and an analysis of the evidence and findings. These findings fully meet the requirements of Section 4. The Court below found that the order is supported by findings and conclusions based on substantial evidence. Thus Mechling's question 5 (J.S., p. 4) is unsubstantial.

CONCLUSION.

These appeals present no substantial issue warranting plenary consideration and the judgment of the Court below should be affirmed.

Respectfully submitted,

RICHARD J. MURPHY
1225 LaSalle Street Station
Chicago 5, Illinois
Attorney for The New York Central Railroad Company, Appellee

Dated: March 5, 1963.

PROOF OF SERVICE

I, RICHARD J. MURPHY, Attorney for Appellee, The New York Central Railroad Company, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 5th day of March, 1963, I served copies of the foregoing Motion to Affirm of the Appellee railroad on the several parties by mailing copies thereof in duly addressed envelopes, with postage prepaid, as follows:

1. On the Appellant, Board of Trade of the City of Chicago, copies to its attorneys Harold E. Spencer, Esq., and Richard M. Freeman, Esq., One North LaSalle Street, Chicago 2, Illinois.

2. On the Plaintiffs-Appellants, A. L. Mechling Barge Lines, Inc., Ira Bookwalter, Cullom Cooperative Grain Company, Charles Treasure, Griswold Grain Company,

and Mazon Farmers Elevator, copies to their attorneys Edward B. Hayes, Esq., and Wilbur S. Legg, Esq., 135 South LaSalle Street, Chicago 3, Illinois.

3. On the Appellee, United States of America, copies to the Honorable Archibald Cox, Solicitor General of the United States, Department of Justice, Washington 25, D.C., and to James P. O'Brien, Esq., United States Attorney for the Northern District of Illinois, Room 450 United States Court House, Chicago, Illinois.

4. On Appellee Interstate Commerce Commission, copies to Robert W. Ginnane, Esq., its General Counsel and H. Neil Garson, Esq., its Associate General Counsel, Washington 25, D.C.

5. On Appellees, Farmers Cooperative Elevator Company, Federal North Iowa Grain Company, Milla Grain & Supply Company, Union Hill Farmers Elevator, Neilsen Grain Company, Ferris Grain Company, Frank Gibbons Grain Company, Cahill Grain Company, Diemer Grain Company, Priscilla Grain Company, McNabb Grain Company, Missal Farmers Grain Company, Payne-Stotler Grain Company, Lostant Grain Company and Isaac Barrett Grain Company, and copies to their attorney, Leo P. Day, Esq., 6202 South Campbell Avenue, Chicago, Illinois.

RICHARD J. MURPHY

APPENDICES

APPENDIX A.

INTERSTATE COMMERCE COMMISSION
WASHINGTON

October 16, 1957

NOTICE OF HEARING

FOURTH SECTION APPLICATION NO. 33955
CORN AND CORN PRODUCTS, ILLINOIS TO
OFFICIAL TERRITORY

The above numbered application filed by Agent O. E. Schultz, which seeks authority to establish and maintain rates on corn, and corn products, carloads, from specified points in central territory to specified points in official territory, without observing the long-and-short-haul provision of section 4 of the Interstate Commerce Act, is hereby assigned for hearing on December 4, 1957, at 9:30 A. M., United States Standard Time, at the U. S. Customs House, 610 South Canal Street, Chicago, Ill., before Examiner Walter L. Baumgartner.

By the Commission.

HAROLD D. MCCOY,
Secretary.

APPENDIX B.

Susp.—12352
August 26, 1957

NOTICE

Petitions have been filed with the Commission requesting suspension of a proportional rate on corn and corn products, carloads, minimum weight 100,000 pounds. Such proposed rate to be applicable from seventeen origins in Illinois to Kankakee, Ill., for application on through traffic to points in Central Territory, as set forth in Supplement 126 to New York Central Railroad Company tariff I.C.C. 1169 to become effective August 29, 1957.

Upon consideration of the matters involved, the Commission, Board of Suspension, today concluded not to suspend the operation of this schedule.

No action has as yet been taken as to Fourth Section application No. 33955.

This action does not constitute approval of the protested schedules. They may be made subject to investigation through formal complaint filed in accordance with the Commission's Rules of Practice.

ROBERT J. TEST
Acting Secretary

Fourth Section Order No. 18784

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Fourth Section Board, held at its offices in Washington, D. C. on the 27th day of August, A. D., 1957.

CORN AND CORN PRODUCTS, ILLINOIS TO OFFICIAL TERRITORY

By fourth-section application No. 33955 as amended, O. E. Schultz, agent, for and on behalf of carriers parties to Agent H. R. Hinsch's tariffs I.C.C. 4403 and 4499 and The New York Central Railroad Company's tariff I.C.C. 1169, applies for authority to establish and maintain the rates hereinafter described without observing the long-and-short-haul provision of section 4 of the Interstate Commerce Act. An investigation of the matters and things involved in the application having been made, which application as amended is hereby referred to and made a part hereof:

It is ordered, That applicants in No. 33955 as amended, be, and they are hereby, authorized to establish and maintain over their proposed routes for the transportation of corn and corn products, in carloads, as more fully described in the application, from points in Illinois on The New York Central Railroad Company, Van's Siding to Moronts, inclusive, to points in central, trunk-line and New England territories, rates constructed on the basis described in the application, as proposed therein, and to maintain higher rates from and to intermediate points; *Provided*, That rates from and to such higher-rated intermediate points shall not be increased except as may be authorized by this Commission, nor exceed the lowest combination of rates subject to the Interstate Commerce Act.

And it is further ordered, That the relief herein authorized shall continue until the effective date of the further order to be entered after hearing in fourth-section application No. 33955 as amended

The Commission does not hereby approve any rates that may be filed under this authority, all such rates being subject to complaint, investigation and correction if in conflict with any provision of the Interstate Commerce Act.

By the Commission, Fourth Section Board.

HAROLD D. McCOY,
Secretary.

(SEAL)

INTERSTATE COMMERCE COMMISSION
Washington, D. C.

Susp.—12352
August 27, 1957

NOTICE

Division 2, acting as an appellate division, voted today not to suspend protested schedules naming a proportional rate on corn and corn products, carloads, minimum weight 100,000 pounds, applicable from seventeen origins in Illinois to Kankakee, Ill., for application on through traffic to points in Central Territory, as set forth in Supplement 126 to New York Central Railroad Company tariff I.C.C. 1169 to become effective August 29, 1957.

The Board of Suspension had concluded not to suspend the protested schedules and the action of Division 2 followed the filing of an appeal for reconsideration of the Board's action. The action of the Board of Suspension and of Division 2 does not constitute approval of the protested schedules.

ROBERT J. TEST,
Acting Secretary.

INTERSTATE COMMERCE COMMISSION
Washington, D.C.

F.S.A. No. 33955
August 28, 1957

NOTICE

Division 2, acting as an appellate division, voted today to sustain the action of the Fourth Section Board in granting relief from the long-and-short-haul provision of section 4 of the Interstate Commerce Act in connection with rates on corn and corn products, carloads, from origins in Illinois on The New York Central Railroad Company to points in central, trunkline and New England territories.

The action of Division 2 followed the filing of appeals for reconsideration of the action of the Fourth Section Board. The action of the Fourth Section Board and of Division 2 does not constitute approval of the rates. They may be subject to an investigation through formal complaint filed in accordance with the Commission's Rules of Practice.

ROBERT J. TEST
Acting Secretary

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 746

A. L. MECHLING BARGE LINES, INC., ET AL.,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, et al.,
Defendants-Appellees.

Appeal From The United States District Court For The Northern District Of Illinois

MOTION TO AFFIRM

Come now defendants-appellees, McNabb Grain Company, Federal North Iowa Grain Company, Union Hill Farmers' Elevator, Neilsen Grain Company, Ferris Grain Company, Frank Gibbons Grain Company, Cahill Grain Company, Diemer Grain Company, Priscilla Farmers' Co-operative Company, Missal Farmers' Grain Company, Payne-Stotler Grain Company, Lostant Grain Company, and Isaac Barrett Grain Company, who were parties to proceeding before the Interstate Commerce Commission and interveners as defendants in the Court below and, pursuant to Rule 16 (1c) of the Revised Rules of this Court, move that judgment of the District Court be affirmed.

STATEMENT

The Jurisdictional Statement of the Mechling Barge Lines and others (on pp. 3-4) raises questions as to (1) the adequacy of the railroad rates; (2) the propriety of rates that will divert traffic from water carriers; (3) the refusal of the Commission to deny fourth section relief because the inbound rate factor to Kankakee is alleged to be non-compensatory; (4) the railroads would receive the haul from Chicago even if they were forced to relinquish the inbound haul to river transportation; (5) the Commission did not consider duly presented evidence; (6) the departure rate would violate other sections of the Interstate Commerce Act; and (7) the correctness of the Commission's conclusions.

The interest of these appellees as operators of small country elevators at points west of Kankakee on the New York Central Railroad is stated in their Motion to Affirm filed in connection with the Jurisdictional Statement of the Board of Trade of Chicago herein.

Appellant Mechling Barge Lines, Inc., as a water carrier of corn and other bulk freight, is exempt from rate regulation. Section 303 (b) of the Act to Regulate Commerce [49 U.S.C., Sec. 903 (b)]; *Mechling Barge Lines, Inc., Extension*, 306 I.C.C. 223, 225. The other appellants joined with it in its Jurisdictional Statement do not ship corn on the competitive rail rates involved herein, but are users of river transportation.

ARGUMENT.

Form of Publication of the Reduced Rail Rates.

Despite appellants' criticism (p. 7) of the form in which the rail rates in question were published, the combination method employed is one of the three ways of stating rates that are recognized by the statute. *St. Louis S. W. Ry. Co.* v. *United States*, 245 U.S. 136. Section 6 of the Act imposes no duty to publish single factor rates, and the Commission has plenary authority over the form and arrangement of tariffs. *Famechon Co.* v. *Northern P. Ry. Co.*, 23 F. (2d) 307, affirming 11 F. (2d) 312.

The Through Charges Are Compensatory.

While conceding the adequacy of the through rail rates as to which the Commission granted fourth section relief, appellants contend that the proportional factor to Kankakee is non-compensatory and that the profitableness of the through charge is due to the amount received from the reshipping rates applying beyond Kankakee. In this contention, appellants overlook the plain and unambiguous language of the governing statute.

Section 4 (1) makes it unlawful

> "for any common carrier * * * to receive any greater compensation *in the aggregate* for the transportation of * * * like kind of property for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, * * * " (emphasis supplied)

No provision is made therein for separate consideration and treatment of particular segments of through charges, as it is in the case of Section 1 (5) where

> "every unjust and unreasonable charge for * * * service or *any part thereof* is prohibited and declared to be unlawful." (emphasis supplied)

Throughout its existence the Commission has held that the greater charge in the aggregate for a shorter than for a longer distance over the same line in the same direction is not to be determined by the proportion allotted to different roads on the line but by the rate as an entirety. *Imperial Coal Co.* v. *Pittsburgh & L. E. R.R. Co.*, 2 I.C.C. 618; *Detroit Board of Commerce* v. *Grand Trunk Ry. Co.*, 2 I.C.C. 315; *Board of R.R. Commrs.* v. *Atchison, T. & S. F. Ry. Co.*, 34 I.C.C. 111; and *Sheldon Axle & Spring Co.* v. *Lehigh V. R. Co.*, 53 I.C.C. 43.

The proportional rate to Kankakee, standing alone, presents no fourth section problem, since it applies alike from Moronts, the most distant origin, and every intermediate point. It is never collected separately in connection with the movement to Kankakee, but is applied as a part of the through charge to Eastern destinations and then only when outbound shipments are made from or through that point.

Appellants rely on the case of *Atchison, T. & S. F. Ry. Co.* v. *United States*, 279 U.S. 768, as supporting its position but, as the Commission points out in its report (p. 450) that case was one in which this Court condemned a railroad's attempt to increase a local rate to a transit point after the traffic was shipped out of that point by another railroad. No fourth section question was there involved.

The evidence not only showed that the aggregate charges are compensatory, but that the proportional rate to Kankakee was compensatory, and even to a greater degree than the reshipping rates from that point to Eastern destinations. For example, a study of a representative movement of 1101 cars shipped to Kankakee showed the average weighted distance to Kankakee was 39.21 miles,

average revenue per car, $66.07, and average revenue per car-mile, $1.68. For the through movement to all destinations, with an average weighted distance of 885 miles, the average revenue per car was $448.42, and average car-mile revenue, 50.69 cents. In other words, the proportional rate to Kankakee, although applied for only 4.4 per cent of the through distance, accounted for 14.7 per cent of the aggregate revenue. Other evidence consisted of comparisons with other rates, and the relative simplicity and economy of moving corn over the rural Kankakee branch. In approving a rate to Battle Creek, Mich., which yielded earnings of $70 per car, and 38 cents per car-mile, for the 184-mile movement there involved, the Commission, in *Corn Grits from Kankakee*, 237 I.C.C. 413, said of the movement over this branch and other lines of the New York Central that the rate applied

> "over a route of low traffic density, over which the traffic could be handled without additional train miles, as contrasted with the present joint rates from producing points in northern Illinois and Indiana to Battle Creek which apply over a longer route of high traffic density through Chicago * * *."

Evidence as to the same simple and economical operations in moving corn to Kankakee was introduced before the Commission in the case at bar.

If the statute required the Commission to scrutinize every segment of through transportation and every part of the through charges, it would be found in some instances that a given part of the service produced no revenue at all. For example, ex-barge corn that is shipped by rail from Chicago to Kankakee for subsequent movement to the East could be said to pay nothing extra for the 75-mile haul to Kankakee, as corn so shipped pays no more than

does all-rail corn reshipped from Kankakee to the same eastern point. The same would be true, of course, of all-rail corn reshipped from Kankakee to the East via Chicago, since the reshipping rate from Kankakee via Chicago and the reshipping rate from Chicago via Kankakee to the East are the same. The same situation prevails in the movement of ex-barge corn from Chicago via Milwaukee to an eastern destination, on the one hand, and from Milwaukee via Chicago on all-rail or ex-water corn to the same destination, on the other. For the movement from the intermediate point, the rail reshipping rate applies. For bringing the corn from the more remote reshipping point, the carriers receive no additional compensation.

The foregoing examples strikingly illustrate why, in a fourth section case, it is impossible to consider separately each segment of the through charge and the lack of merit in appellants' complaint (on p. 8) which deals only with the application of ex-barge rates from Chicago and disregards the analogous situation of all-rail grain reshipped from Kankakee. The reshipping rate applies in exactly the same manner from the intermediate point whether the movement is from Chicago via Kankakee or from Kankakee via Chicago.

Appellees Are Legally Entitled to Compete for Corn Grown Along the Kankakee Branch.

Appellants mistakenly assume that the Act to Regulate Commerce and the National Transportation Policy declared by Congress require rail carriers to withdraw from the competition for traffic in any area where water transportation is available. They argue that, as the barge movements end at Chicago and the railroads carry the corn to the East whether it reaches Chicago by barge or rail from the origin area involved, the railroad should

not be permitted to originate this grain (notwithstanding the proven urgent need of the Kankakee line for traffic) but instead all corn should be trucked to river elevators and transported thence to Chicago by barge. This contention, aside from its patent legal infirmity, overlooks the fact that only a fraction of the barged corn received in Chicago is shipped east by rail. It also moves east on the Great Lakes, and by rail in other directions.

Section 15a (3) of the Act provides that

> "* * * Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy declared in this Act." [49 U.S.C., Sec. 15a (3)]

The National Transportation Policy, 49 U.S.C., preceding Secs. 1, 301, 901 and 1001, states:

> "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; * * * "

In *Mississippi Valley Barge Line Co.* v. *United States*, 292 U.S. 282, 288, this Court said of the National Transportation Policy:

> "* * * The admonition does not mean that carriers by rail shall be required to maintain a rate that is too high for fear that through the change they may cut into the profits of carriers by water. The most that it can mean, unless, conceivably in circumstances of wanton or malicious injury, is that where carriers by land and water are brought within the range of the regulatory powers of the Commission, as *e.g.*, in establishing through routes or joint rates, there shall be impartial recognition and promotion of the interests of all."

In *Youngstown Sheet & Tube Company* v. *United States*, 7 F. Supp. 33, affirmed in 295 U.S. 476, the Court said at p. 38 of its opinion:

> " * * * we think the Commission confronted by two duties, not necessarily irreconcilable, one to promote water transportation and the other to preserve rail transportation, has performed both, when, within the zone of reasonableness, it has struck a just and proper balance between them. In determining this balance between the encouragement of the one and the preservation of the other form of transportation, the discretionary response to congressional mandate or admonition is, of course, that of the Commission, and not that of the court, and if recognition is given to each consideration that advantages the one or other, we cannot say that such discretion is abused, or that determination was arbitrary or capricious."

This Court also discussed the matter of competition between rail and water transportation in *Mechling* v. *United States*, 319 U.S. 671, saying at p. 691 of its decision:

> "The policy provisions of the Transportation Act of 1940, as well as the specific statutory provisions provide only standards of considerable generality and some overlapping. It requires administration to 'recognize and preserve the inherent advantages of each' rail, water and motor transport. It also seeks 'sound economic conditions' for all kinds of transportation."

Appellants' repeated reference to "cutthroat" competition is groundless and unwarranted. The amount of free corn moved by railroad from this origin area, following publication of the competitive rates, was shown to be approximately 13 per cent of the total handled therefrom by both barge and rail, excluding the export corn which moves at rates lower than those here involved. Yet, almost all of the corn grown along the NYC for shipment was, for many years, transported by rail until the canalization

and development of the Illinois River some 25 years ago resulted in its gradual diversion to the Waterway. The fact that these appellees and the railroads have been able to regain 13 per cent of the available traffic herein can scarcely, or appropriately, be characterized as "cutthroat" competition, particularly as river transportation of corn not only did not decline following establishment of competitive rail rates, but showed a substantial increase. The advantage of river movement is indicated, not only by the tremendously greater tonnage now moving by water than by rail from the origin area, but also by the fact that corn is trucked from, and through, shipping points on the Kankakee branch for long distances to the river in order to obtain the benefit of its substantially lower transportation charges.

Comparison of Corn Bids.

Appellants' comparison (pp. 9-10) of corn bids at "Missal, Illinois, on the Kankakee Belt Line and at Kernan, Illinois, port" is with unlike things, as the Commission points out in its report. Appellants sought to have the Commission disregard the cost of elevation service required to transfer corn from truck to car, but to take into account on the other hand the cost of such handling from truck to barge at the river. In the year preceding the publication of the reduced rates, 81 per cent of Kernan shipments had been trucked to the river, and 19 per cent moved by rail to all destinations. None of its traffic has been shipped over the Kankakee branch.

Appellants' Claims of Other Violations by Rail Carriers Are Irrelevant to the Fourth Section Proceeding and Without Basis in Fact or Law.

Appellants make numerous charges of violations of law resulting from the establishment of the railroads' competitive rates, but no attempt is made to point to any

facts, or the law governing them, to substantiate their contentions. We have already dealt with the contention that the proportional rate to Kankakee is non-compensatory, which is repeated a dozen times or more in appellants' Jurisdictional Statement. The claim of alleged discrimination on p. 13 of appellants' statement is answered in our motion to affirm in connection with the Jurisdictional Statement of the Board of Trade of Chicago. The reference to alleged competing elevators on other rail lines is likewise unfounded. Despite their proximity to appellees' elevators and the availability of the railroad's rates and shipping facilities, their traffic continues to be trucked to river elevators as it was in the period before these competitive rail rates were made effective.

CONCLUSION.

Appellants' Jurisdictional Statement has presented no substantial question that would warrant plenary consideration by this Court. In granting the carriers' application for fourth section relief, the Commission, based on ample evidence, found that the rates in question are reasonably compensatory; it made adequate and proper findings with respect to the lawfulness of the departure rates; and its ultimate finding is based on requisite findings supported by substantial evidence.

The attempt made by appellants to confine the Court's consideration here to a small segment of the through charges involved in the fourth section application is not only without legal basis, but its contentions are also without factual support in the record. The naked claims of discrimination and undue preference are in respect of issues not relevant in a hearing held solely on the railroads' fourth section application, and are not sustained by the evidence, as the rates apply equally and uniformly for all shippers and all communities.

Appellants' repeated insistence that the NYC (and with it these appellees) withdraw entirely from competition for their locally grown corn, so that it may move out by water, is unwarranted and completely disregards fundamental rights of these appellees.

The appeal herein presents no substantial issue that warrants plenary consideration, and the judgment of the Court below should therefore be affirmed.

Respectfully submitted,

Leo P. Day,
Attorney for McNabb Grain Company, and Others.

PROOF OF SERVICE

I, LEO P. DAY, Attorney for Defendants-Appellees McNabb Grain Company and others, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 5th day of Mareh, 1963, I served copies of the foregoing Motion to Affirm of the Defendants-Appellees McNabb Grain Company and others on the several parties by mailing copies thereof in duly addressed envelopes with postage prepaid as follows:

1. On the Appellant, Board of Trade of the City of Chicago, copies to its attorneys Harold E. Spencer, Esq., and Richard M. Freeman, Esq., One North LaSalle Street, Chicago 2, Illinois.

2. On the Plaintiffs-Appellants, A. L. Mechling Barge Lines, Inc., Ira Bookwalter, Cullom Cooperative Grain Company, Charles Treasure, Griswold Grain Company, and Mazon Farmers Elevator, copies to their attorneys Edward B. Hayes, Esq., and Wilbur S. Legg, Esq., 135 South LaSalle Street, Chicago 3, Illinois.

3. On the Appellee, United States of America, copies to the Honorable Archibald Cox, Solicitor General of the United States, Department of Justice, Washington 25, D.C., and to James P. O'Brien, Esq., United States Attorney for the Northern District of Illinois, Room 450 United States Court House, Chicago, Illinois.

4. On the Appellee, Interstate Commerce Commission, copies to Robert W. Ginnane, Esq., its General Counsel, and H. Neil Garson, Esq., its Associate General Counsel, Washington 25, D.C.

5. On the Appellee, The New York Central Railroad Company, copies to its attorney Richard J. Murphy, Esq., Room 1225 LaSalle Street Station, Chicago 5, Illinois.

LEO P. DAY

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

BOARD OF TRADE OF THE CITY OF CHICAGO,
Appellant,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE NEW YORK CENTRAL RAILROAD COMPANY, ILLINOIS GRAIN COMPANY, et al,
Appellees.

Appeal From The United States District Court For The Northern District Of Illinois

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MOTION TO AFFIRM

LEO P. DAY,
6202 South Campbell Avenue,
Chicago 29, Illinois
Attorney for McNabb Grain Company, and Others.

McCORMICK & HENDERSON INC., CHICAGO, ILL.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 747

BOARD OF TRADE OF THE CITY OF CHICAGO,
Appellant,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE NEW YORK CENTRAL RAILROAD COMPANY, McNABB GRAIN COMPANY, et al.,
Appellees.

Appeal From The United States District Court For The Northern District Of Illinois

MOTION TO AFFIRM

Come now appellees, McNabb Grain Company, Federal North Iowa Grain Company, Union Hill Farmers' Elevator, Neilsen Grain Company, Ferris Grain Company, Frank Gibbons Grain Company, Cahill Grain Company, Diemer Grain Company, Priscilla Farmers' Cooperative Grain Company, Missal Farmers' Grain Company, Payne-Stotler Grain Company, Lostant Grain Company, and Isaac Barrett Grain Company, who were parties to the proceedings before the Interstate Commerce Commission and interveners as defendants in the Court proceeding below and, pursuant to Rule 16, paragraph 1 (c) of the Revised Rules of this Court, move to affirm the decree of the District Court.

STATEMENT

These appellees are, and for many years have been, operators of small country elevators located at stations along a branch line of the New York Central Railroad west of Kankakee in the Illinois corn belt. Until the emergence of water transportation on the Illinois River over twenty years ago, the corn grown along this branch was hauled to appellees' elevators for shipment and appellees were able to carry on elevator operations and services such as are customarily rendered by country elevators. Due, however, to prohibitively high railroad rates and the substantially lower charges available for river transportation, the corn grown along the New York Central was gradually diverted to river elevators owned by large Chicago grain interests until virtually all rail movements of commercial corn in the area had ceased, and appellees were compelled to discontinue their elevator businesses.

This complete shut-down of appellees' normal business activities continued for several years until December 15, 1956, when the railroads established reasonable competitive all-rail rates to the East from the origin stations involved. Although the barge-rail rates were lower, appellees were able to recover a portion of the corn lost to their river competitors, especially in those instances where long truck hauls to the river were required. Appellees' elevators were then reopened and their services resumed until a temporary restraining order of a District Court, on August 27, 1957, suspended the all-rail rates for a period of three months and again forced appellees to close their elevators until the Court's restraining order was vacated.

Ordinarily these rail rates do not permit of drawing grain more than five or six miles to appellees' elevators whereas river elevators, with the advantage of lower barge-rail rates, are able to draw grain from fields as far as 40 miles or more distant. In the period following publication of the competitive rail rates the movement of corn on the river from the ten competing river elevators increased quite substantially. The record likewise makes it clear that any worsening of appellees' competitive position, in respect of transportation rates, would destroy their businesses and their investments in elevators and equipment and deprive them of their normal livelihood.

The railroad branch line previously mentioned, which is sometimes referred to as the Kankakee Belt, extends from Zearing, Ill., on the west to South Bend, Ind., on the east. It was originally incorporated and operated as the Indiana, Illinois & Iowa Railroad Company. For convenience, a map of this branch is attached hereto as Appendix A. It also shows other branches of the NYC from Kankakee to Chicago; the Illinois Central's line between the same points; portions of lines of the NYC leading south and southeast from Kankakee; and of its two main lines from Chicago to the East. The Kankakee branch is the direct line from the corn shipping points to the East, and it connects directly with every eastbound railroad from Chicago (including the NYC's main lines) at junctions east of Kankakee, including South Bend. The map also shows the ten river ports (Lacon to Lockport, Ill.) with which appellees compete for corn grown along the NYC, and also indicates highway distances from rail stations to river ports, ranging from 4 to 36 miles. The Kankakee branch

is a line of low traffic density, serving a rural area. There are no cities or large towns west of Kankakee—Streator being the largest—and few industries. Because of the inroads made on its tonnage in recent years by barge and motor truck, and the paucity of traffic, serious consideration has recently been given to abandoning the west end of this branch. (Rec. 192-193)

During the period when exorbitant all-rail rates and low barge-rail charges forced the cessation of appellees' elevator activities, corn from the origin area for milling in transit at Kankakee had to reach that nearly point by the following route: (a) trucking to the river, (b) barge to Chicago, (c) rail from Chicago to Kankakee, a distance of 75 miles via NYC, or 56 miles via Illinois Central. The Commission found that the aggregate distances via such tortuous route exceeded by 133 to 797 per cent the distance from Belt points to Kankakee and to certain eastern destinations. The rail distances alone from Chicago via Kankakee exceeded by 3.73 to 20.61 per cent the distances from the country origins via Kankakee. (Report, pp. 448-449) While Kankakee today receives most of this nearby corn by rail, the rate advantage of the barge-rail route has enabled it to continue handling a portion of the corn for Kankakee, despite the circuity of such route.

ARGUMENT

The Aggregate Charges Involved

Appellant refers to a 5-cent proportional from Kankakee branch origins to Kankakee, which is added to the reshipping rate from that point to arrive at the through charges in question. Appellant uses 54.5 cents, the through rate to New York, as a typical example. It also cites a 23-cent rate as a local rate applying from Streator, Ill., to Kankakee or Chicago. As the Commission's report indicates, the rates cited have been increased as a result of several general rate advances authorized by the Commission, but in order to avoid misunderstanding or confusion, appelless will refer to the rates used by appellant.

Appellant's discussion on p. 5 of its Jurisdictional Statement, with respect to the make-up of rates before and after December 15, 1956, has no bearing on the issue presented here. The first two charts on p. 6, relating to earlier rates, are correct so far as they go, and despite the absence of any movement under them, they applied via Chicago, Kankakee and all other points, just as do the present competitive rates.

In the chart at the bottom of p. 6, however, appellant seeks to make it appear that the rate applicable to shipments via Chicago is 72.5 cents while a movement via the direct route to the East through Kankakee is only 54.5 cents. The fact is that the rate of 54.5 cents applies via Chicago the same as via all other points, and with all the privileges and benefits available to any shipper. Although appellant seeks to have it appear that a movement via Chicago involves payment of higher charges than are paid via other points, the Commission's report correctly shows

the contrary, and the fact is conceded on p. 9 of appellant's statement. Although appellant implies on p. 7, and elsewhere in its Statement, that it is no longer on a competitive equality, there is nothing anywhere in its Jurisdictional Statement, or in the record, that gives the slightest support to its contention.

Appellant's Opposition to All-Rail Transportation

Appellant's position in this case is plainly shown in the testimony of its principal witness, who stated:

> "We have tremendous investments in Chicago, built upon the river and its low cost transportation, which gives Chicago an opportunity to utilize its natural adtages of being on the Great Lakes, on its inland waterways, as well as being able to be served by truck and rail." (Rec. 790)

and also:

> "* * * we have a real interest in grain that comes in by barge. * * *" (Rec. 795)

While investments of these appellees cannot be said to be tremendous, they mean as much to them as do investments of Chicago grain firms on the river to appellant. Unlike appellant, appellees do not seek a monopoly over the corn that is produced in the vicinity of their elevators, but only the right to compete for a share of it. This is all that the reduced rail rates have accomplished.

Rail competitive rates have forced river shippers to make higher bids to the farmer for his corn due to competition from rail buyers. Previously, when only prohibitively high rail rates were in effect, river shippers had complete control over prices to be paid the grower. They were free to base their bids on a spurious (because unused) rail rate of 23 cents to Chicago although the river transportation charge they actually paid was only about 4½ cents. With

competitive and bona fide rail rates the producer is assured a fair price for his corn, and appellant's rate advantage is limited perforce to the actual difference between the lower charge by river and rail and the competitive all-rail rates, instead of on a purely *paper* rail rate to Chicago. While appearing in these proceedings as purported rail shippers and claiming—without any basis for it—that rail shipments moving via Chicago from the Kankakee branch are discriminated against, the record shows that only 31 out of approximately 1800 cars moved to, or via, Chicago. None of the 31 cars was identified as having been shipped for account of Chicago interests, and the direction of movement of such cars from Chicago was not indicated, but if shipped to the East they were charged exactly the same rates as any similar shipments moving via the direct routes eastward from Kankakee.

While ostensibly demanding equality of treatment as a rail shipper—something it has always had and still has—appellant is in the anomalous position of urgently insisting that these rail rates be materially increased, while at the same time demanding that the same rates be made to apply over additional routes (more circuitous even, than those presently applying via Chicago) with greater transit privileges and a broader commodity application than are now provided, all of which, of course, would substantially increase the railroads' costs.

While Discrimination under Section 3(1) Is Not an Issue in a Fourth Section Proceeding, No Such Discrimination Exists

Although it is charged, and frequently reiterated in appellant's Jurisdictional Statement, that the rates in question subject Chicago to discrimination and also that the Commission did not consider evidence it submitted to show that the rates would unduly prejudice Chicago grain inter-

ects in violation of Section 3 (1) of the Interstate Commerce Act, the record is completely devoid of proof of discrimination or prejudice. Aside from purely gratuitous statements, appellant has made no attempt to support its charges as will be demonstrated in the succeeding pages of this argument. On the other hand, the Commission's report herein definitely and correctly shows (p. 451) that

> "* * * since the proposed rates are effective over Chicago, that point has the same stature as all other corn-processing points in official classification territory in their application. * * *"

When appellant's specific claims are analyzed, it will be found that in no instance do they show, or have any bearing upon the question of, discrimination or prejudice. They deal with matters beyond the purview of the governing tariffs, and are nothing more than demands by appellant for new and additional provisions and services over and above what the railroads have published in their tariffs. The fallacy of its contentions is readily apparent in the following language on p. 7 of its Statement:

> "* * * The effect of this milling in transit requirement is to make the new low Kankakee combination *rate applicable exclusively on corn products.* At the same time, the railroads made the one-factor rates inapplicable via Kankakee, leaving only the new, drastically reduced, Kankakee combination to apply. To New York from Streator, this resulted in a Kankakee combination of 54.5 cents on corn products, as shown by Chart III. The rate on corn remained unchanged at 72 cents, since the 5 cent inbound rate could not be used on shipments of whole corn. * * * the NYC * * * refused to make the 5 cent rate applicable to Chicago * * * where it could have been combined with the Chicago proportionals, making the Chicago combinations equal to the new Kankakee combination. * * *"

(a) In No Instance Do the Rail Rates in Issue Apply on Whole Corn.

In the language just quoted appellant objects to having the railroads' tariffs confined to corn products, but such limitation applies to all shippers alike, regardless of origin, destination or routing. The application of the through 54.5 cent rate referred to is the same, whether the traffic moves via Chicago or over direct routes eastward from Kankakee. For the same reason—and contrary to the inference appellant seeks to have drawn here—the rate of 72 cents on corn has remained unchanged and applied to all shipments from origins west of Kankakee to the East, regardless of ownership or the route traveled.

Obviously then, there can be no discrimination in either case, and the Commission correctly holds in effect that a fourth section proceeding is not a proper vehicle for proposing to bring additional commodities and services within the application of the tariffs here involved. The Interstate Commerce Act provides full opportunity for parties to present for the Commission's legislative determination any such question of new and additional rates.

(b) The 5-Cent Proportional Rate to Kankakee.

The last part of the language quoted above would make it appear that Chicago does not have the benefit of the 5-cent proportional to Kankakee when corn is shipped to Chicago for transit or reshipment to the East. We have previously adverted to appellant's admission to the contrary.

The 5-cent rate was not published to Chicago (a point 75 miles beyond Kankakee via the NYC) or to any other point for that matter, but it definitely applies via Chicago on shipments to the East as a part of the 54.5 cent

combination through rate. Its application on shipments processed at, or shipped through, Chicago is exactly the same as at Kankakee, or at Danville or Paris, Ill., processing points located south of Kankakee as Chicago is north. As the rate charged on corn moving to, or through, Chicago is in every instance the same as is charged on like traffic moving through all other points, appellant errs in implying that the movement via Chicago involves higher charges than via some other point. The Act prohibits the charging "any greater compensation *in the aggregate.*" (Sec. 4 (1) of the Interstate Commerce Act.) The law does not concern itself with the manner in which segments of a rate are put together so long as there is equality of treatment between shippers in the *aggregate* amount of charges they actually pay for a given service.

(c) The Alleged Restrictive Transit Privileges and Routing.

At p. 9 of appellant's Statement, it is claimed that the reduced combination rates

> "were subject to more restrictive transit privileges and *more restrictive routing than Chicago* processors had *previously had available.*"

It is noteworthy that appellant makes no claim or suggestion here that any other processor has any less restrictive transit privileges or routing in connection with these rates, but only that they are more restrictive than Chicago *previously had available.* The rates, in these respects as in all others, apply indiscriminately.

Moreover, the transit privileges and routing Chicago processors had under higher rates are still available, just as they are available to the Kankakee or Danville processor. Here again the question of enlarging the quantum

of the services rendered by the railroads for less compensation is one for the Commission's rate-making power and beyond the scope of a fourth section proceeding where the rates in issue are definitely stated and the measure of the service to be performed clearly specified in the tariffs.

(d) No Shipper at Any Point Receives a Credit or Rebate of Any Part of the Inbound Rate To Milling Points.

On p. 8 of appellant's Jurisdictional Statement it is erroneously stated:

> "• • • on and after December 15, 1956, the processors at Kankakee and east thereof could take advantage of the new rates, knowing that when the corn was processed and shipped out as corn products, they would secure a credit for the difference between the 23-cent rate and the 5 cent rate. They were thus in a position to offer 18 cents per 100 pounds (approximately 10 cents per bushel) more for the corn than could the Chicago grain dealers and elevator operators. • • •"

The fact is that a 23-cent rail rate is collected at Kankakee upon arrival of the corn the same as it is at Chicago. Processors at both points have identical milling-in-transit privileges. There is no provision in the tariff for a rebate or "credit" of any part of the 23-cent inbound rate, as appellant implies, and to rebate any portion thereof would subject shipper and carrier alike to the heavy penalties imposed by law for such a violation. [49 U.S.C., Sec. 41(1)]

Actually, the carrier would have no notice, at either Chicago or Kankakee, of the disposition to be made of the corn until reshipment takes place. The corn might be consumed locally, in which event the carrier in either instance would retain the entire 23 cents; or the corn, or the product

thereof, could be shipped to the Pacific Coast, the South, or the North, as well as to the East. We cannot too strongly stress the fact that no adjustment whatever of the through charges is possible at either Kankakee or Chicago until the carrier receives reshipping orders apprising it of the destination of the shipment. In the event the movement is to a point in Eastern territory, the carrier in either case will assess the difference between the 23 cents collected on the inbound shipments and the through rate of 54.5 cents. Whether the outbound movement is from Chicago or Kankakee, the balance of the charges to be collected will be precisely the same, namely, 31.5 cents.

During all the time a shipment remains at Chicago or Kankakee, the 5-cent proportional has no standing or application. It is never collected as a separate charge. It is never credited to the shipper, as appellant indicates, or any refund made from the 23-cent inbound rate. It enters into the computation of the freight charges only after a shipment has been consigned to, or delivered at, destination in the East. In no instance is the 5-cent proportional any less of a segment of the aggregate through charges via Chicago than it is via Kankakee. Since the rate via Chicago is the same as via Kankakee, it is obvious that Chicago is in the same position to offer 18 cents more for corn, based on the 5-cent proportional, because it enters into the make-up of the through charges in the same manner. If there is any disadvantage here, it lies in requiring Kankakee processors to put up the same amount of money for an average inbound haul of 38 miles as Chicago does for an additional transportation movement of 75 miles, including costly transportation services performed in and through the congested Chicago district.

(c) Cases Cited by Appellant Do Not Support Its Contentions.

Contrary to the contention of appellant (on p. 12) the Commission's treatment and consideration of the evidence in this case fully conforms to the dicta quoted by appellant from the *Intermountain Rate Cases*, 234 U.S. 476. Indeed, appellant has given reference to no decision supporting its contention that a fourth section investigation, involving a carriers' application only must be decided—not on the basis of the provisions of the application—but only in connection with such new rates, rules, and routes as may be proposed by adverse parties. Appellant belabors its claim of discrimination, but there is not the slightest support in the record or in its Jurisdictional Statement for any of its contentions. Such statements as

> "it is beyond the power of the Commission to authorize fourth section departure rates which would violate other sections of the Act"

and that

> "The Commission did not explain why it departed, in the instant case, from its own precedents on the question of its power to grant fourth section relief."

are simply a play on words without reason or basis. No violation has been shown, and no such departure by the Commission as appellant ascribes to it.

Unfair and Destructive Competitive Practices

Appellant's reference (p. 12) to unfair and destructive competitive practices seems ironic in view of the almost complete destruction of the business operations of these appellees and the transportation of corn by rail. Until the establishment of reasonable rail rates enabled them to recover a portion of the corn they had lost to the river,

the river shipping interests had taken over all of the corn grown along the Kankakee branch while rail elevators were idle and falling into disrepair.

Far from having an adverse effect on river transportation, the reduced rail rates seemed to have actually stimulated the movement of corn by water from the ten competitive river ports, for the Commission found (Report, p. 452) that those river ports

> "increased their shipments of corn to Chicago from 402,105 tons in the period December 15, 1955 to August 30, 1956, to 493,669 tons in the corresponding period the following year during which time the proposed rates were in effect.

Prior to publication of the reduced rail rates, shipments by rail were limited to several hundred cars per year of Government corn for export that moved at rates substantially lower than those here involved. (Report, 440, 448) While the competitive rail rates are higher than those available for barge-rail transportation, they have been the means of returning to these appellees and the railroads at least a share of the corn previously lost to the river, principally from fields at some distance from river elevators. For example, in the first six months following establishment of these rail rates there were 388 cars shipped from Union Hill, a point 31 miles from the nearest river port and only 14.5 miles from Kankakee. On the other hand, the rail rates failed to attract a single car for shipment from Moronts, a rail point on the river and only four miles from a river port. The record contains many examples of corn being hauled to the river from, and through, points where appellees' elevators are located, despite the competitive rail rates in effect and additional truck hauls of 20 miles, or more, required to reach the river elevators.

The Commission Did Not Fail to Consider All of the Evidence Adduced by Appellant, but There Was Not a Scintilla of Evidence Tending to Prove Discrimination.

Appellant makes the broad charge that the Commission did not consider evidence of discrimination. We have previously demonstrated there was no such evidence. If there had been, it should be a simple matter for appellant to point out specifically wherein, and how, such discrimination occurs. We have shown that the rates and tariff provisions apply impartially to all shippers, and the matters that appellant complains about are new and additional proposals intended for its own special benefit. The Commission properly held they have no place in a fourth section proceeding where its consideration must necessarily be limited to the application before it.

Typical of appellant's unsubstantiated general assertions of discrimination are the following:

> "* * * The Board of Trade * * * submitted evidence showing discrimination against Chicago. It filed a brief and was heard on oral argument. But the Commission refused to consider that evidence. * * *" (p 16)

and, on p. 17:

> "* * * the Commission has authorized particular rates which result in undue prejudice to some shippers and undue preference of others."

It is fair to ask: What evidence? What prejudice? Appellant's Statement is replete with similar bald assertions of the kind just quoted, but nothing that is said anywhere in its Statement even remotely tends to sustain them and they are wholly without support in the record. There is not a single provision, restriction, qualification or limitation in the tariffs that does not apply equally to all points and all shippers.

In view of what as already been stated, it seems unnecessary to comment on similar general averments on pp. 17-18 and the statement (p. 19) that

> "* * * An elevator having the benefit of these special preferential rates, can take all the business from a competing elevator, just a few miles away. * * *"

River elevators for many years have indeed taken all the business from these appellees because of their preferential rates, but the statement quoted has no application whatever to the reduced rail rates. Elevators which are not located on the Kankakee branch have for years been sending their corn to the river, and they have continued to do so since the competitive rail rates took effect, despite the longer truck hauls required. Appellant's contention also runs counter to the admonition of this Court that it will not listen to a party who complains of a grievance which is not his. *Interstate Commerce Commission* v. *Chicago, R. I. & P. R. Co.*, 218 U.S. 88, 109; *Clark* v. *Kansas*, 176 U.S. 114, 118.

Appellant Relies on Matters That Are Not of Record in These Proceedings.

At the bottom of p. 13, and continuing through to the end of p. 20, of appellant's Jurisdictional Statement, reference is made to certain matters *de hors* the record in this case. They include *inter alia* alleged recommendations of some "special grain committee" made on April 13, 1961 (more than ten months after issuance of the Commission's report herein.) These appellees have no knowledge whatever of such matters, or of recent proceedings before the Commission involving other rates, or the other things referred to by appellant that arose after the close of the record in this case. Appellant's representations

with respect to them have no bearing upon the issues here, and its attempt to inject them into this case is unwarranted and improper. *Schley* v. *Pullman Sleeping Car Co.*, 120 U.S. 575; *Louisiana & P. Ry. Co.* v. *United States*, 246 U.S. 457.

CONCLUSION.

These appellees have a vital interest in the outcome of this case, for their businesses and their livelihood are at stake.

We believe it has been plainly demonstrated that appellant has utterly failed to advance any sound reason for its attack on the legality of the Commission's order granting fourth section relief and the decision of the District Court upholding it. While claiming discrimination and prejudice against Chicago, and asserting that the Commission failed to consider evidence thereof, appellant has signally failed to substantiate any of its contentions. It has, without question, the identical rates, routes, milling-in-transit privileges and all other provisions available to any other shipper anywhere, a fact which appellant has failed to controvert or disprove. To the extent that it discusses its claims specifically, it will be found they involve matters and things in nowise contained in the tariffs here involved and hence not proper subjects for consideration or review in a fourth section case. These tariffs do not differentiate between shippers or localities in any particular. They have uniform application to all.

Appellant's interest here is in water transportation in which it has tremendous investments. The restoration of rail competition has broken up the monopolistic control which appellant had over both the transportation of, and the bidding for, corn grown along the NYC. Congress, in

the Hoch-Smith Resolution, has declared that products of agriculture should have "the lowest possible lawful rates compatible with the maintenance of adequate transportation service. (49 U.S.C., Sec. 55) *Increased Railway Rates, Fares and Charges,* 248 I.C.C. 545, 611.

Experience with the reduced rail rates has conclusively shown that while they have been the means of regaining for appellees and the railroad a portion of the corn previously lost to the river, they have had no adverse effect upon appellant or its tremendous river investments. The transportation of corn from this area by water actually increased following establishment of the competitive rail rates. Appellant's claim of destructive competition is wholly unfounded.

Appellant has presented no substantial issue warranting plenary consideration, and the judgment of the Court below should accordingly be affirmed.

Respectfully submitted,

Leo P. Day,
6202 South Campbell Avenue,
Chicago 29, Illinois,
Attorney for McNabb Grain Company and Others.

Dated March 5, 1963.

PROOF OF SERVICE

I, LEO P. DAY, Attorney for Defendants-Appellees McNabb Grain Company and others, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 5th day of March, 1963, I served copies of the foregoing Motion to Affirm of the Defendants-Appellees McNabb Grain Company and others on the several parties by mailing copies thereof in duly addressed envelopes with postage prepaid as follows:

1. On the Appellant, Board of Trade of the City of Chicago, copies to its attorneys Harold E. Spencer, Esq., and Richard M. Freeman, Esq., One North LaSalle Street, Chicago 2, Illinois.

2. On the Plaintiffs-Appellants, A. L. Mechling Barge Lines, Inc., Ira Bookwalter, Cullom Cooperative Grain Company, Charles Treasure, Griswold Grain Company, and Mazon Farmers Elevator, copies to their attorneys Edward B. Hayes, Esq., and Wilbur S. Legg, Esq., 135 South LaSalle Street, Chicago 3, Illinois.

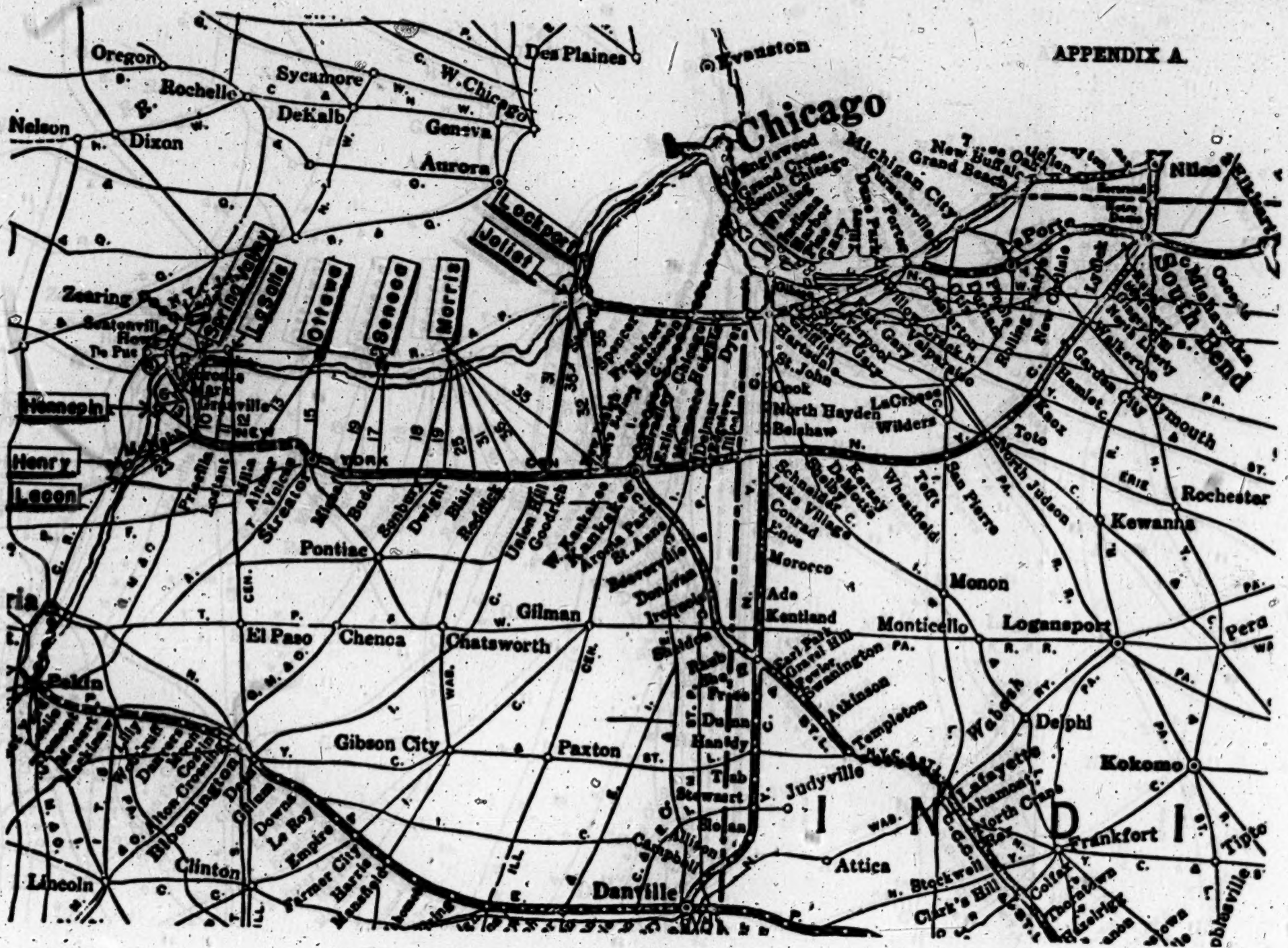
3. On the Appellee, United States of America, copies to the Honorable Archibald Cox, Solicitor General of the United States, Department of Justice, Washington 25, D.C., and to James P. O'Brien, Esq., United States Attorney for the Northern District of Illinois, Room 450 United States Court House, Chicago, Illinois.

4. On the Appellee, Interstate Commerce Commission, copies to Robert W. Ginnane, Esq., its General Counsel, and H. Neil Garson, Esq., its Associate General Counsel, Washington 25, D.C.

5. On the Appellee, The New York Central Railroad Company, copies to its attorney Richard J. Murphy, Esq., Room 1225 LaSalle Street Station, Chicago 5, Illinois.

LEO P. DAY

APPENDIX A.


Oregon
Rochelle
Sycamore
DeKalb
Des Plaines
Evanston
Chicago
Nelson
Dixon
Geneva
Aurora
Lockport
Joliet
Zearing
Henry
Lecon
Pontiac
Gilman
El Paso
Chenoa
Chatsworth
Gibson City
Paxton
Clinton
Lincoln
Danville
Attica
Judyville
Monticello
Monon
Logansport
Delphi
Kokomo
Frankfort
Rochester
Kewanna
Plymouth
South Bend
Niles
Michigan City
Grand Beach
Hammond
Gary
Valparaiso
La Porte
Knox
Toto
North Judson
San Pierre
Wabash
Peru
Tipto
Lafayette
Colfax
Thorntown
Elwood
Kentland
Ade
Morocco
Conrad
Enos
Lake Village
Schneider
Shelby
DeMotte
Kersey
Wheatfield
Tefft
Brook
Rensselaer
Remington
Earl Park
Oxford
Fowler
Atkinson
Templeton
Dunnn
Handly
Stewart
Sloan
Tab
Milford
Campbell
Blockwell
Clark's Hill
Yeoman
Delphi
Monticello
Logansport
Peru
Kokomo
Frankfort
Tipto
Lafayette
Attica
Danville
Lincoln
Clinton
Gibson City
Paxton
Chatsworth
Chenoa
El Paso
Gilman
Pontiac
Streator
Ottawa
Seneca
Morris
LaSalle
Spring Valley
Hennepin
Henry
Lecon
Zearing
Sentonville
Hovey
Tonica
Prairie
Lodant
Mina
Valley
Streator
Michael
Budd
Sunbury
Dwight
Blair
Reddick
Union Hill
Goodrich
W. Kankakee
Kankakee
Aroda Park
St. Anne
Beaverville
Danforth
Ironsides
Buckley
Ridge
Prairie
Dunnn
Handly
Stewart
Sloan
Tab
Milford
Campbell
Judyville

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FILED
MAR 25 1963
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

BOARD OF TRADE OF THE CITY OF CHICAGO,
Appellant,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE NEW YORK CENTRAL RAILROAD COMPANY, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF OF APPELLANT IN OPPOSITION TO MOTIONS TO AFFIRM

HAROLD E. SPENCER
RICHARD M. FREEMAN
One North LaSalle Street
Chicago 2, Illinois
Counsel for Board of Trade of the City of Chicago, Appellant

J. S. CHARTRAND
141 West Jackson Blvd.
Chicago 4, Illinois

BELNAP, SPENCER, HARDY & FREEMAN
One North LaSalle Street
Chicago 2, Illinois
Of Counsel

Dated: March 25, 1963

McCORMICK & HENDERSON INC., CHICAGO, ILL.

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United States v. Merchants & M. Traffic Asso., 242 U.S. 178	2, 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 747

BOARD OF TRADE OF THE CITY OF CHICAGO,
Appellant,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE NEW YORK CENTRAL RAILROAD COMPANY, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF OF APPELLANT IN OPPOSITION TO MOTIONS TO AFFIRM

Appellant, Board of Trade of the City of Chicago (Board of Trade) submits this brief in opposition to the motions to affirm filed by The New York Central Railroad Company (NYC) and the McNabb Grain Company, *et al.*, (McNabb), intervening defendants in the court below. Neither the United States nor the Interstate Commerce Commission has filed a motion to affirm.

This appeal raises the following question:

> May the Interstate Commerce Commission, over the protest of affected shippers and localities, authorize rail carriers to maintain rates which depart from the

long-and-short-haul requirement of section 4 of the Interstate Commerce Act, without considering and determining whether such fourth-section-departure rates would violate section 3(1) of the Act by causing undue prejudice against such shippers and localities?

That part of the argument in the motion to affirm filed by the NYC which pertains to this appeal is found on pages 10-16 of the motion. Substantially all of the arguments there made were anticipated in appellant's Jurisdictional Statement. However, a few brief additional comments are warranted.

The principal thrust of the NYC's argument that the question presented is not substantial is that this Court decided in *United States* v. *Merchants & M. Traffic Asso.*, (the *Sacramento* case) 242 U.S. 178 (1916), that "the Commission is not required to make a final determination in respect to the lawfulness of the rates under other sections of the Act in a hearing limited, as this one was, to the railroads' fourth section application." (NYC motion, pp. 10-11) This Court, we submit, did not make any such holding in the *Sacramento* case, nor can such a result be reasonably inferred from anything which this Court said in that case. The argument of the NYC that the hearing in the instant case was "limited . . . to the railroads' fourth section application" begs the question. At no time did the Commission, in the instant case, limit the hearing on "permanent" fourth-section relief to exclude the section 3(1) issue. On the contrary, consistent with its past practice and decisions, the Commission received the Board of Trade's evidence on the section 3(1) issue. The notice of hearing in this proceeding (NYC motion, App. A) did not limit the hearing. The earlier notices and orders in the suspension and "temporary" authority matters, to which the NYC refers (App. B), suggested that

a complaint might be filed to test the lawfulness of the rates. In accordance with past Commission practice, such a complaint became unnecessary when the fourth-section application was assigned for hearing.

We submit that a hearing on such a fourth-section application cannot be "limited" to exclude consideration of legal issues which must be passed upon to determine whether the rates in issue are consistent with all applicable sections of the Act. The rule of the *Sacramento* case is not to the contrary. Its holding is that one who is not a party to the hearing before the Commission is not entitled to a rehearing to present contentions of unlawfulness under sections 2 and 3, but that, in such circumstances, the appropriate remedy is a proceeding under section 13 or 15 of the Act.

The NYC also argues that *Intermountain Rate Cases*, 234 U.S. 476 (1914), means only that an intermediate shipper, and not a competing shipper, is entitled to raise section 2 and 3 issues. There is no such limitation in the Court's language and, we submit, no such limitation can be read into the language.

The NYC attempts to explain away the long line of cases in which the Commission said that it would not authorize fourth-section-departure rates which would violate other sections of the Act by dividing such cases into various categories. By making such a separation, the NYC simply reinforces our contention that the Commission has steadfastly followed the *Intermountain Rate Cases* in all categories of cases.

The only aberration in the courts or the Commission is the dictum in *Seatrain Lines* v. *United States*, 168 F. Supp. 819, 824, (S.D. N.Y., 1958) which, as pointed out in our Jurisdictional Statement (p. 15), is plainly wrong. It is

that decision which appears to have led the Commission and the lower court to depart from the Commission's long-standing interpretation of section 4.[1] It is important to the Commission and parties appearing before it to have the doubt created by *Seatrain Lines* laid to rest. This need, standing alone, shows that the question raised by this appeal is substantial, requiring plenary consideration by this Court.

The National Transportation Policy requires the maintenance of "reasonable charges for transportation services, without unjust discriminations, undue preferences, or advantages." The NYC argues that neither the Commission nor the court below held that the Commission is excused from taking cognizance of the National Transportation Policy. But the Commission's failure to consider the evidence of the Board of Trade showing unjust discrimination and undue preference and prejudice is inconsistent with the injunction of the National Transportation Policy, which requires that "all" provisions of the Act shall be administered and enforced with a view to carrying out that policy.

Finally, the NYC argues that appellant's reference to other rate adjustments which have been precipitated by the Kankakee adjustment is irrelevant to the question presented because those proceedings are investigations instituted pursuant to section 15(7) of the Act "in which all questions as to the lawfulness of the rates there in-

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[1] Two other cases cited by the New York Central, *Koppers Company v. United States*, 132 F. Supp. 159 (W.D. Pa., 1955) and *Florida Citrus Commission v. United States*, 144 F. Supp. 517 (N.D. Fla., 1956) are general revenue increase cases in which the courts did not consider the section 4 question here raised. These cases simply hold that the Commission need not examine the lawfulness of a particular rate when it is determining whether the whole of the rate structure may be increased.

volved will be determined." (NYC motion, p. 16) This misses the point, as does a somewhat similar argument in the McNabb motion (p. 16). Appellant did not refer to those cases because of any similarity of legal issues. Reference was made to those proceedings to illustrate the far-reaching effect which the Kankakee rates, here in issue, have had on the rate structure as a whole. Appellees neither do, nor can, deny that fact.

The McNabb motion does not deal with the issue now before the Court, *i.e.*, the substantiality and importance of the question presented, but is simply an attempt to argue the merits of whether the evidence of the Board of Trade proved that the involved rates cause unlawful discrimination and prejudice against Chicago. This is a question which is not, and will not be, before the Court in this appeal; the Commission never reached the determination of that factual question since it held that, in this case, it need not determine whether the rates were unduly prejudicial to Chicago in violation of section 3 of the Act. That the rates do discriminate against Chicago, however, is well shown, among other things, by the statement on page 7 of the McNabb motion that, out of 1800 cars moving off the Kankakee Belt line, only 31 moved to, or via, Chicago.[2]

[2] The period covered by these figures, which is not stated in the motion, was the first six months of 1957, which was after the 5-cent rate became effective. During the same period the previous year, before the rates became effective, a substantially greater number of cars moved by rail to Chicago from Kankakee Belt elevators, although the total number of cars shipped from Belt elevators was smaller.

The McNabb motion contains certain errors of fact and erroneous and unwarranted characterizations of the evidence.[3] For example, it is stated (p. 12):

> Since the rate via Chicago is the same as via Kankakee, it is obvious that Chicago is in the same position to offer 18 cents more for corn, based on the 5-cent proportional, because it enters into the make-up of the through charges in the same manner.

As pointed out in our Jurisdictional Statement (p. 8), one of the principal contentions of the Board of Trade is that the rates involved, being applicable only on corn products and not on whole corn, discriminate against the Chicago corn merchants, and prevent them from buying corn originating on the Kankakee Belt in competition with the Kankakee processor. It is not true that the Chicago corn merchant is in the same position as the Kankakee processor to offer 18 cents more for the corn. When the Kankakee processor buys corn off the Kankakee Belt, he knows he will receive a credit of 18 cents when the corn is milled

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[3] The NYC motion (p. 8) also erroneously states that *corn* moving on the Kankakee combination "can be stored in transit or milled in transit at Chicago." Corn cannot be stored in transit and reshipped to destinations in the East as whole corn. It can be stored in transit only if it is also milled in transit prior to destination. In other words, as stated in the Jurisdictional Statement (p. 7), the Kankakee combination applies only on corn products; it does not apply on whole corn.

In referring to the rate charts on page 6 of the Jurisdictional Statement, the NYC states (p. 7) that the NYC had no movement from Streator during the years 1954-1956. There is an apparent conflict in the record as to whether corn moved from Streator to Chicago during 1954-1956. Whether or not corn moved to Chicago from Streator is of no moment here, since Streator was selected only as a convenient point to illustrate the rate situation before and after the 5-cent rate became effective. The same rate discrimination is illustrated by comparisons of any one of the Belt stations from which the record shows, without contradiction, substantial movements of corn to Chicago prior to the 5-cent rate.

into products and reshipped to the East.[4] Except in unusual circumstances, the Chicago merchant cannot buy the corn on such a basis since, when he buys the corn, he does not know where his outlet will be.

McNabb's argument that there is no discrimination against Chicago because the Kankakee combinations on corn products apply via Chicago is covered in appellant's Jurisdictional Statement (pp. 8-9).

CONCLUSION

For the reasons stated herein and in appellant's Jurisdictional Statement, it is submitted that the question presented by this appeal is substantial and important, and that the Court should note probable jurisdiction of this appeal.

Respectfully submitted,

HAROLD E. SPENCER

RICHARD M. FREEMAN
One North LaSalle Street
Chicago 2, Illinois
Counsel for Board of Trade of the City of Chicago, Appellant

J. S. CHARTRAND
141 West Jackson Blvd.
Chicago 4, Illinois

BELNAP, SPENCER, HARDY & FREEMAN
One North LaSalle Street
Chicago 2, Illinois
Of Counsel

Dated: March 25, 1963

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[4] The statement on page 11 of McNabb's motion that no shipper receives a credit on any part of the inbound rate is in error, as is shown by the NYC motion (p. 7), by appellant's Jurisdictional Statement (p. 7), and by statements in the McNabb motion itself.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

A. L. MECHLING BARGE LINES INC., a corporation, IRA BOOKWALTER, CULLOM COOPERATIVE GRAIN COMPANY, CHARLES TREASURE, GRISWOLD GRAIN COMPANY, and MAZON FARMERS ELEVATOR,

Plaintiffs-Appellants,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois

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REPLY TO MOTIONS TO AFFIRM

EDWARD B. HAYES,
WILBUR S. LEGG,
Attorneys for Plaintiffs-Appellants.

LORD, BISSELL & BROOK,
135 South LaSalle Street,
Chicago 3, Illinois,
Telephone: 346-7475.
Of Counsel.

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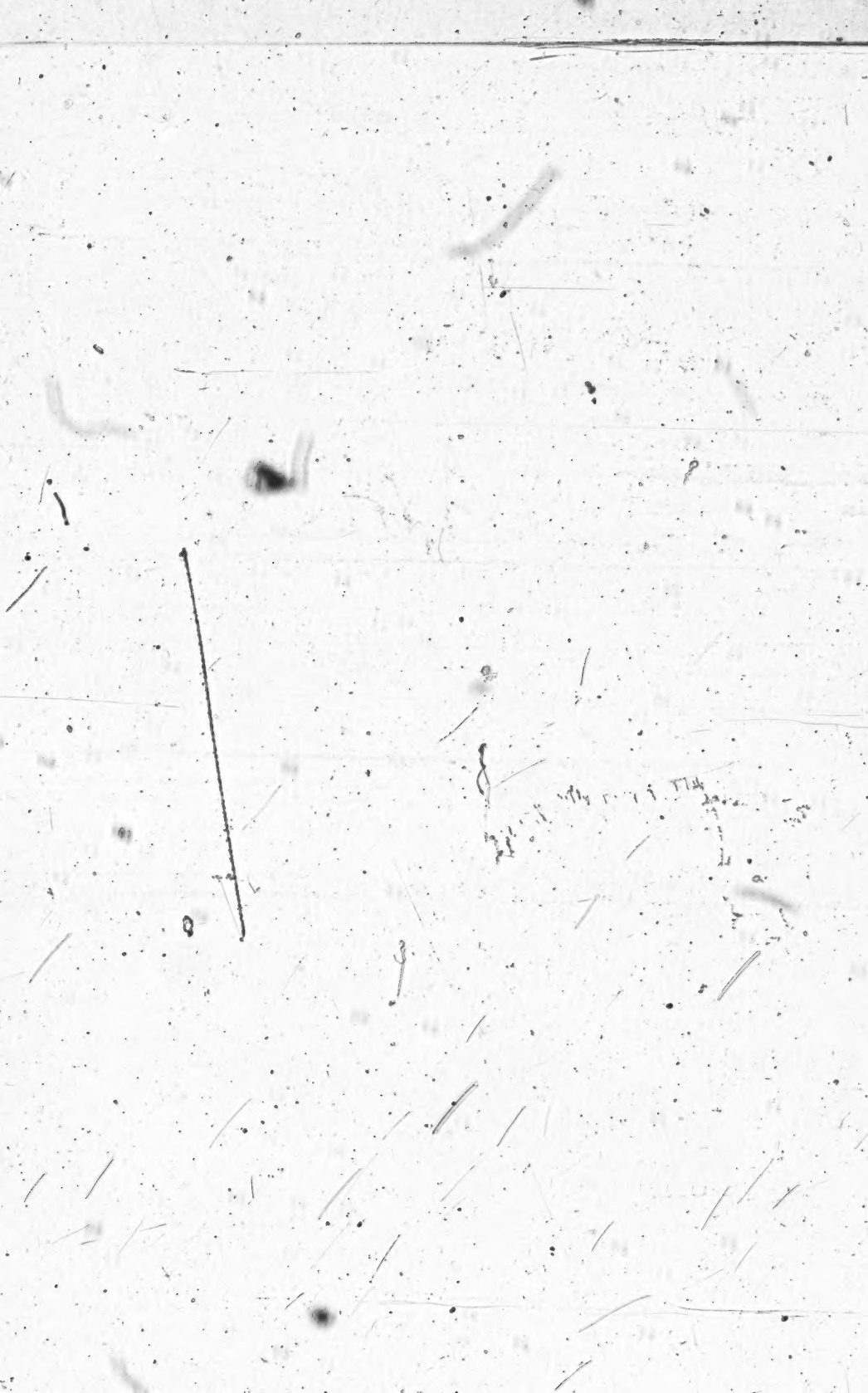


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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 746

A. L. MECHLING BARGE LINES INC., a corporation, IRA BOOKWALTER, CULLOM COOPERATIVE GRAIN COMPANY, CHARLES TREASURE, GRISWOLD GRAIN COMPANY, and MAZON FARMERS ELEVATOR,

Plaintiffs-Appellants,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois

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REPLY TO MOTIONS TO AFFIRM

Intervenors on behalf of defendants have filed motions to affirm the order of the court below. The United States and the Interstate Commerce Commission are the defend-

ants. Neither defendant has filed such a motion and neither joins in those made by the intervenors, after reviewing the record and conferring with the intervenors as contemplated in their application for additional time filed with this Court on February 11, 1963.

The New York Central Railroad Company has filed a combined motion to affirm in each of the two appeals, Nos. 746 and 747, whereas McNabb Grain Company, et al. have filed separate motions in each of them. The appeals are so intertwined as to be inseparable and these appellants will reply to the motions insofar as they relate to points raised by these appellants on appeal.

At the outset it should be observed that the motions filed on behalf of McNabb Grain Company, et al. misstate the record frequently,[1] charge appellants with statements or contentions they did not make,[2] and seek to avoid certain of the legal questions presented by the appeal by supply-

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[1] E.g. on page 2 counsel makes the irrelevant statement that appellant Mechling is exempt from rate regulation, whereas the evidence of both appellees and appellants showed that Mechling had filed its rates for this traffic with the Commission.

[2] On page 3 appellants are alleged to have criticized the form in which the questioned rates were published. Appellants have not done so. They mention the form to point out (1) that there is no basis in the record or in fact for the Commission's statement that another form (single factor) of rate might have been used, and (2) that separate publication of the 5½¢ rate has made it all the more apparent that the rate for the haul to Kankakee is non-compensatory.

Again Mechling does not expect the rail lines to withdraw from competition as alleged on pages 6 and 7, but only to comply with the act while competing. Indeed, it was conceded before the Commission that some reduction in the inbound rate would be in order, but not such a large reduction that the rate became non-compensatory and destructively competitive.

ing findings which the Commission did not make and which are contradicted by the evidence of record.[3]

Misstatements aside, the only arguments in the motions are that Section 4 requires only the through rate to be compensatory, and that in authorizing a departure from Section 4, no consideration need be given to violation of other provisions of the Act by the rates. Appellants will discuss these points under separate headings. The motions do not face the questions presented in our jurisdictional statement.

The irrational conclusions of the Commission from the facts found are not discussed at all, except to say that the

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[3] Two examples (of many): Seeking to avoid the legal consequences of the non-compensatory inbound 5½¢ rate, McNabb, et al. assert that it is compensatory (a pretense in which the Commission has not joined), putting forward generalized gross revenue comparisons (Motion 4, 5). The Commission's report states that the record here on the costs of this rail service inbound to Kankakee is, that such costs were 8.56¢ or 8.57¢ per 100 pounds for the weighted average distance hauled of 38.3 miles—against that rate of only 5½¢ per 100 pounds. That being the record, as stated by the Commission's report (pp. 439, 450) it is "crystal clear," as the Examiner puts it, that the separately published, water-competitive, inbound rail rate is not compensatory "for the service performed" for that charge.

Again motions of McNabb, et al. assert on page 7, that "only a fraction of the barged corn in Chicago is shipped east by rail." The testimony of record is that nearly all barged corn is shipped east by rail since such shipments represent the most advantageous use of ex-barge billing at Chicago. The Commission erroneously ignored the fact that the applicant railroads as a group received the reshipping rate from Chicago whether the corn was barged to Chicago or hauled by rail to Kankakee, and that the only added revenue available to them (by diverting this inbound barge traffic) to pay for the inbound rail haul was the non-compensatory 5½¢ rate.

Commission's report is "replete with discussion", a fact not questioned by appellants. Appellants urged only that much of this replete discussion did not logically follow from what had been found, or from evidence, and that, however lengthy, the discussion ignored and contained no findings on substantial points. For example, neither motion contains any semblance of logical justification for a conclusion that a river elevator bid is higher and therefore more attractive than a competing rail elevator bid, when the witness testifying to the bids categorically stated that the rail elevator was getting the corn at the time those bids were made.*

I. THE WATER-COMPETITIVE 5½¢ RATE HAD TO BE COMPENSATORY IF THE FOURTH SECTION DEPARTURE RATE WAS PROPERLY TO BE AUTHORIZED.

Both the New York Central and McNabb Grain Company urge that Section 4 requires only the aggregate fourth section departure rate to be compensatory, and that separate factors in the aggregate rate need not be compensatory. (Counsel for McNabb Grain Company concedes (p. 3) that a separately stated factor must comply with Section 1 (5) of the Act, *viz.*, must be compensatory.) The language in Section 4 relied upon by counsel for this contention does not, however, relate to the compensatory rate requirement. They point to the words "greater compensation in the aggregate" found in the first sentence of Section 4(1). There it is a part of the description of those rates for which the Commission's authority is required

* The nature of the attempt to prevent full consideration of the important issues presented is illustrated by the sententious emphasis of McNabb, et al. on the absence of rail shipments from Moronts (McNabb, 747, p. 14). The fact is that there is no elevator in operation there!

before they can be lawfully charged or received. The language does not appear in the subsequent proviso setting forth certain conditions under which the Commission is powerless to grant such authority. In the proviso the requirement is not that the aggregate rate, but that "any charge . . . from the more distant point" be compensatory.[5] That this significant distinction was intentionally made to prevent establishment of any non-compensatory rates or charges from the more distant competitive point is clear from the language itself, from Senator Townsend's discus-

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[5] Section 4(1) reads as follows, through the first proviso:

"4, par. (1) It shall be unlawful for any common carrier subject to this chapter or chapter 12 of this title to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this chapter or chapter 12 of this title, but this shall not be construed as authorizing any common carrier within the terms of this chapter or chapter 12 of this title to charge or receive as great compensation for a shorter as for a longer distance: **Provided**, That upon application to the Commission and after investigation, such carrier, in special cases, may be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property, and the Commission may from time to time prescribe the extent to which such designated carriers may be relieved from the operation of the foregoing provisions of this section, **but in exercising the authority** conferred upon it in this **proviso**, the Commission shall not permit the establishment of any charge to or from the more distant point that **is not reasonably compensatory for the service performed**; and no such authorization shall be granted on account of merely potential water competition not actually in existence: * * *". (Emphasis supplied.)

sion shown on pages 14-15 of our Jurisdictional Statement, and from contemporaneous decision. (J. S., 17) Both language and purpose of Section 4 condemn such non-compensatory rates, and that condemnation is underscored by the requirement in 1940 that Section 4 must be construed to effect the National Transportation Policy. The motions fail to discuss the conscious destruction of the inherent and admitted low cost advantage of the barge carriers, on the extraordinary ground that the Commission considers it not to be destructive to destroy that which Congress has said must be preserved. (J. S., 9)

Except for the erroneous statement by counsel for McNabb et al. that ex-barge corn at Chicago is not largely reshipped to the east by rail, neither motion discusses the fact that the applicant railroads receive no additional revenue from the corn originating on the Kankakee Belt other than the non-compensatory 5½¢ rate. The New York Central (NYC, p. 10) relies on certain findings of the Commission at 310 I.C.C. 448-449 to the effect that the New York Central (which is not the sole applicant for relief) might save some handling and switching expense in bringing corn into Kankakee from Belt Stations rather than over its circuitous route to Kankakee from Chicago. In the first place the argument made on these findings ignores that other railroads are parties to the application. (Cf. J. S., 17) One, the Illinois Central Railroad, has a more direct route to Kankakee from Chicago. Other applicants (some of which are subsidiaries of the New York Central) perform the involved switching, which is a source of revenue to them.

Fundamental is the fact that even the New York Central will lose its alleged "savings" of these expenses if the discrimination against Chicago is ended, so as to enable Chi-

cago merchants to use the 5½¢ rate freely. The heavy volume of corn which would go to Chicago would incur all the added "expense" which the New York Central says is now "saved", and the only added revenue still would be from the 5½¢ rate, which does not meet out-of-pocket costs incurred up to Kankakee. Thus the hypothetical saving (to the New York Central only) depends for its very existence upon perpetuation of an unlawful discrimination against Chicago, and will continue only so long as shippers at Chicago can be prevented from making effective use of the rate. Such a justification of the 5½¢ rate could be used only when the Commission refused to consider the evidence of various forms to discrimination against Chicago shippers.* Thus it became essential to the Commission's result to maintain that such discrimination need not be considered in proceedings under Section 4, contrary to the Commission's practice hitherto.

This affords yet a further urgent reason why discrimination issues cannot properly be ignored when application is made for authority to depart from the 4th Section. The "savings" argument is specious to support the rates under the 4th Section; *but it does not even exist* if the discrimination against Chicago is unlawful.

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*In the Commission's report these discriminations are enumerated at page 451 as "discrimination against whole corn by the milling-in-transit limitation; discrimination against Chicago by the proposed rate combination applying over Kankakee when prior thereto rates to the east were made over Chicago; undue preference to the processors of corn by the limitations in the application of the proposed rate to commodities shipped by these processors; and unreasonable routes on the proposed rate combination by the restrictive routes which apply over Kankakee in movements to eastern destinations." The Commission expected the applicants to remove the milling-in-transit limitation, (p. 451, **supra**) but did not so order, and they have not done so.

II. THE COMMISSION WAS REQUIRED TO CONSIDER AND MAKE FINDINGS ON THE COMPLIANCE OF THE DEPARTURE RATES WITH OTHER PARTS OF THE INTERSTATE COMMERCE ACT.

Both motions to affirm urge this Court to hold that the Commission may shut its eyes to violations of the National Transportation Policy and Sections 1 (5), 3 (1), and 3 (4) of the Interstate Commerce Act while granting the authority which is a prerequisite to charge the very rates which effect the violations. The Commission's *duty* to enforce the Act imposed by Section 12 is completely ignored.

McNabb et al. urge that no sufficient showing has been made of such violations (McNabb, pp. 9-10, No. 746). That is not the question or the point here. They admit that Section 1 (5) would apply to the 5½¢ rate by itself (McNabb, p. 3, No. 746), thereby requiring it to be compensatory. The point here is that the Commission refused to make any finding as to whether or not it was compensatory or discriminatory, but authorized it nonetheless.

The New York Central relies on *United States* v. *Merchants & Manufacturers Association*, 242 U. S. 178 (1916) (NYC, p. 11) and a group of district court cases, of which one is relevant. It quotes from the opinion of Justice Brandeis in *Merchants & Manufacturers*, but ignores this section which was the key to this portion of the opinion:

> "They are not bound by the order entered; *at least in the absence of such participation.*" (Emphasis supplied)

Yet the New York Central insists that it is irrelevant that the plaintiffs in *Merchants & Manufacturers* were not parties to the fourth section proceeding before the Commission (NYC, p. 11). The whole point of the case was

that the questions raised before the court had not been timely raised before the Commission by the plaintiffs.

In the present case, on the other hand, the Commission has by its own admission had the questions presented to it in the proceeding before it, but has stated it need not make findings on them, despite its duty under Section 12 and its many prior contrary announcements.[7]

The New York Central then cites *Seatrain Lines, Inc.* v. *United States*, 168 F. Supp. 819 (S.D. N.Y., 1958). In that case the court, relying on the erroneous interpretation of *Merchants & Manufacturers* answered above, stated in a dictum that the Commission need not consider questions of compliance with other parts of the Act in ruling on Section 4 proceedings. The court's rationale (quoted at NYC, p. 12) was additionally erroneous in its assumption that a complaint proceeding would bring before the Commission parties other than the complainants and the carriers complained of. With the wide open protest procedure now followed in Section 4 proceedings, a Section 4 proceeding is considerably more likely than a Section 13 complaint to bring before the Commission all parties affected by a rate proposal.

The New York Central further urges that in fourth section orders, including the temporary order entered in this proceeding, the Commission customarily does not

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[7] On pages 14 and 15 of its motion the New York Central shows the wide range of circumstances in which the Commission has taken the occasion to announce that it would not authorize any fourth section departure rates if they violated any other part of the Act. This distribution well demonstrates the universality with which the Commission had heretofore applied its rule. Significantly neither motion cites any contrary holdings by the Commission prior to this proceeding.

make a final determination of all issues under other sections of the Act and specifically reserves approval under other sections. The Commission makes this reservation to indicate an opening for subsequent complaints by those not parties to the fourth section proceeding. There is, however, no indication in this stereotyped phrase that the Commission will abandon a long-standing practice and refuse to rule on questions of compliance with the Act timely presented to it in fourth section proceedings by parties thereto.

As shown in our Jurisdictional Statement, prior Commission practice, economy of litigation, and the duty of the Commission to enforce the National Transportation Policy and every part of the Act, require that in fourth section proceedings the issues raised by the protests and the evidence be determined by the Commission, and that Commission approval of departure rates be withheld when they violate the National Transportation Policy or other mandates of the Act.

CONCLUSION

The questions presented are substantial; they are important both to the transportation industry and to the Commission. They should be decided by this Court.

For the reasons stated in appellants' jurisdictional statement and herein, the Court should note its probable jurisdiction of this appeal in order that it may be fully advised by brief and oral argument.

Respectfully submitted,

EDWARD B. HAYES,

WILBUR S. LEGG,
Attorneys for Plaintiffs-Appellants.

LORD, BISSELL & BROOK,
135 South LaSalle Street,
Chicago 3, Illinois,
Telephone: 346-7475.
Of Counsel.

Date: March 26, 1963.

CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding, by mailing a copy thereof properly addressed with postage prepaid by first-class mail to each such party.

DATED at Chicago, Illinois the 25th day of March, 1963.

.....

EDWARD B. HAYES

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686277—63——1

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 746

A. L. MECHLING BARGE LINES, INC., ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

No. 747

BOARD OF TRADE OF THE CITY OF CHICAGO, APPELLANT

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE NEW YORK CENTRAL RAILROAD COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

MEMORANDUM FOR THE UNITED STATES

This memorandum is submitted in response to the Court's request that the United States comment upon the Jurisdictional Statements filed by appellants. For the reasons indicated below, we believe that the questions presented by the appeals warrant plenary consideration. If was for this reason that the United

States as appellee refrained from filing a motion to affirm the judgment of the district court.

STATEMENT

This is a direct appeal from a judgment of a three-judge district court which dismissed appellants' complaint seeking to set aside an order of the Interstate Commerce Commission.

1. *The Situation Prior to the Proposed Rates.*—The New York Central Belt Line west of Kankakee, Illinois, roughly parallels the Illinois River, on which Mechling Barge Lines, Inc., operates its barges. The Belt Line is in competition with Illinois River barge lines for the business of transporting corn from northern and central Illinois to intermediate points for reshipment to destinations on the eastern seaboard. Farmers located in northern and central Illinois are in a position to sell their corn either (1) to elevators located along the river for transportation by barge to an east-west railroad or (2) to elevators located along New York Central's Belt Line for transportation by the Belt Line to a connecting east-west railroad. Since the elevators bear the cost of this transportation, the amount they can bid for this corn is significantly affected by rates they must pay (J.S.M. App. C, p. 442).[1]

At one time, corn from this affected area moved over all-rail routes to eastern destinations. About 23 years ago, the development of commerce on the Illinois River started a diversion of traffic from the all-

[1] J.S.M. refers to the Jurisdictional Statement of Mechling Barge Lines, Inc., *et al.* J.S.C. refers to the Jurisdictional Statement of the Board of Trade of the City of Chicago.

rail routes to barge-rail routes. Moved by barge from river ports to Chicago, Illinois, the corn or corn products then moved by rail to eastern destinations. As a result of this diversion, corn traffic on the Belt Line dwindled almost to the vanishing point (J.S.M. App. C, p. 440). The little corn the Belt Line continued to carry was principally corn owned by the Commodity Credit Corporation which is usually shipped by rail for export and is charged a special rail export rate which is less than the domestic rate for corn or corn products(*ibid.*).

Historically, the rail rates on grain and grain products from the affected territory to eastern destinations were composed of combinations of rail rates to and from Chicago. Later when single-factor rates were established they were made equal to these combinations, with the rates on corn products uniformly 0.5 cents higher than those on corn (J.S.M. App. C, p. 438). Thus, before the proposed rates[2] went into effect the rail rate from origins on the Kankakee Belt Line to eastern destinations was 72 cents for corn and 72.5 cents for corn products via Chicago (including Chicago via Kankakee), either as a through rate or as a combination of the 23 cents local rate to Chicago and the 49 or 49.5 cent proportional rate to the east. On the other hand, the average rate on barge traffic which competed with the Belt Line from ten ports along the Illinois River, to Chicago was 4.625 cents (effective December 1957, this average barge rate was raised

[2] Even though the rates now under attack have been in effect for over five years (see *infra*, pp. 6–7), for the sake of simplicity we shall refer to them as the proposed rates.

to 4.825 cents) (J.S.M. App. E, p. 9a). This corn and corn products could then be shipped to the east by rail for 49 or 49.5 cents, just like the corn shipped to Chicago by rail. Therefore transportation of ex-barge[3] corn was substantially cheaper than the transportation of ex-rail corn to eastern destinations.

2. *The Proposed Rates.*—In order to recapture the traffic which had been lost to competing barge lines, the New York Central and its connecting carriers proposed a rate structure featuring a new system of proportional rates. A proportional rate of 5 cents (now 6 cents because of general rate increases) on ship-

[3] The following definitions of terms will be helpful to an understanding of the grain rate structure with which this case is concerned.

Ex-barge corn—Corn transported from a point by rail which has been shipped to that point by barge.

Ex-rail corn—Corn transported from a point by rail which has been shipped to that point by rail.

Local rate—A rate which applies to the transportation of grain and grain products between local points.

Flat rate—A rate of unrestricted application which is not dependent on prior or subsequent transportation.

Proportional rate—A rate which is restricted to traffic having prior or subsequent transportation and is only a portion of the total transportation charge.

Ex-barge proportional rates—Proportional rates applicable to ex-barge traffic.

Ex-rail proportional rates—Proportional rates applicable to ex-rail traffic.

Joint through rate—The total rate from the origin to the final destination published as a single rate covering the entire movement.

Transit—The privilege of stopping grain or grain products at any point for storing, processing, and subsequent shipping.

Division—The share of a joint through rate received by any of the participating carriers.

ments of corn from origins along the Belt Line to Kankakee or Chicago was established (J.S.M. App. C, p. 439). This proportional 6-cent rate does not apply to shipments from origins on the Belt Line ending at Chicago or Kankakee, but only in conjunction with the existing reshipping rate on traffic destined by rail to points in the east, and only to corn milled in transit. At the same time the single factor rate for through movements from these origins to the east, is restricted so as not to apply when the proposed proportional rate is lower (*ibid.*).

The mechanism by which the rate reduction is accomplished is as follows: Shipments originating on the Belt Line are charged the local or flat rate of 23 cents to Kankakee. After milling in transit, if the corn products are shipped east, the inbound charges are adjusted to receive the benefit of the lower proportional rate to Kankakee, so that a credit of 17 cents is applied to outbound movements of corn products by rail whether on New York Central or its connecting carriers (J.S.M. App. C, p. 440). Thus the inbound 6-cent proportional rate does not exist as a separate charge but is applicable only on through movements of corn products to eastern destinations, when milled in transit (*id.* at p. 450).

3. *Proceedings before the Commission.*—The New York Central and its connecting carriers filed the proposed rates to become effective on December 15, 1956, and they were permitted to become effective at that time without protest. Section 4 of the Interstate Commerce Act, 49 U.S.C. 4, prohibits rate charges over the same line which are higher for a ~~long~~ SHORT

haul than for a short haul, where the shorter is part of the longer haul. It was subsequently discovered that by reducing the rates from origins on the Belt Line to eastern destinations but not the rates for the shorter distances from the origins to points in the mid-west (central territory), fourth-section departures were created. Furthermore, the reduction of the rates from the origins on the Belt Line to the east made the rates lower than those applying to the shorter distances from Kankakee and points east, north, and south of Kankakee to the eastern destinations. In other words, under the proposed rate it was less expensive to ship corn products from origins on the Belt Line to the east than from these same origins to points in the mid-west or from Kankakee and points near Kankakee to the east. While the applicants for the new rates believed that outstanding relief, which had been granted by the Commission, covered these departures, in fact they had not been previously authorized (J.S.M. App. C, p. 439).

The appellants filed a protest with the Commission regarding the departures from Section 4. The applicants thereafter cured the fourth-section departures relating to shipments to central territory by reducing the rates from origins on the Belt Line to this area. New York Central applied for and received from the Fourth Section Board of the Commission temporary authority for fourth-section departures which the modified rates still required. On August 21, 1957, certain of the appellants commenced an action in the United States District Court for the Northern District of Illinois to suspend the Commission's tem-

porary fourth-section order. The court on that date issued a temporary restraining order which was vacated on November 28, 1957, when the action was dismissed for want of jurisdiction. Thus, the rates which are the subject of the Commission order now under attack have been in effect for nearly five and one-half years (J.S.M. App. C, p. 439).

a. The rail carriers' application for fourth-section relief was set down for a hearing before an examiner. At this hearing, the Chicago Board of Trade (appellant in No. 747), protested that the proposed rates would violate Section 3(1) of the Interstate Commerce Act, 49 U.S.C. 3(1), which prohibits undue discrimination against shippers and localities. The Chicago Board of Trade charged that the proposed rates were prejudicial because Chicago grain merchants, as a practical matter, are prevented from buying corn off the Kankakee Belt Line. When corn is brought into Chicago or Kankakee, the inbound freight charges are borne by the country shipper. After the proposed rates went into effect, processors at Kankakee and points east knew that they could take advantage of the new reduced rates, since corn processed at these locations would be shipped east, and such processors would obtain a credit for the difference between the 23-cent flat rate and the 6-cent proportional rate. On the other hand, when Chicago grain dealers and elevator operators purchase corn on the Chicago market they are not sure whether the corn will be reshipped east. The reason for this is that Chicago buyers are not processors but dealers who intend to sell to still unknown buyers for an unknown destination. Hence,

the Chicago buyers do not know whether the corn they will purchase will qualify for the reduced inbound rate from origins on the Belt Line to Chicago. Therefore, the processors at Kankakee, with the assurance that they could take advantage of the reduced proportional rate, are able to outbid Chicago merchants who lack this assurance. As a result, the Board of Trade contended, the proposed rates discriminate against Chicago grain merchants (see J.S.C., p. 8).

Corn processors at Chicago, it was charged, are also discriminated against by the proposed rate. The claim made on their behalf is that the transit privileges in the proposed tariffs are limited so that Chicago processors cannot take advantage of the reduced proportional rate and that certain territorial restrictions in the proposed tariff favor the processor at Kankakee (J.S.C., p. 9).

The Commission rejected the protestants' contentions under Section 3(1) on the ground that "these [discrimination] issues do not directly deal with the fourth-section principles here involved, but are properly matters which may be raised in investigation or complaint proceedings" (J.S.M. App. C, p. 451). It went on, however, to note that "there is no indication of undue damage to Chicago" (*ibid.*).[4]

b. During the same proceeding before the hearing examiner, Mechling Barge Lines (one of the appellants in No. 746), attempted to challenge the proposed

[4] The Commission also noted that the New York Central intended to remove the milling-in-transit limitation on the proposed rate, but as yet this has not been done.

rates because of alleged discrimination against the barge lines carrying corn to Chicago. It charged that such discrimination violated the provisions of Section 3(4) of the Interstate Commerce Act, 49 U.S.C. 3(4), which prohibits discrimination between connecting carriers. Mechling's position was that when corn comes to Chicago by rail over the Belt Line, and qualifies for the proposed rate, a credit of 13 cents is given to the New York Central by connecting carriers on rail movements to destinations in the east, whereas ex-barge corn is charged the full rate of 49 or 49.5 cents for the movement from Chicago to the east. It was urged that this practice of charging less for ex-rail transportation than ex-barge transportation was condemned as violative of Section 3(4) in *Interstate Commerce Commission* v. *A. L. Mechling Barge Lines*, 330 U.S. 567, and held to be improper, even if accomplished through the division of through rates, in *Dixie Carriers* v. *United States*, 351 U.S. 56 (see J.S.M., p. 19).

At the hearing, Mechling was not permitted to continue cross-examination of a witness on the issue of discrimination against connecting barge lines because the hearing examiner ruled that this issue was not relevant in a fourth-section proceeding. Neither the examiner's nor the Commission's report discussed the Section 3(4) issues which the appellant attempted to raise.

c. Appellants also alleged before the Commission that the proposed rates did not meet the standard of being "reasonably compensatory", which is required by Section 4, 49 U.S.C. 4, in order for rates to qual-

ify for relief from the provisions of that section. The hearing examiner found that the inbound proportional rate from the origins on the Belt Line to Kankakee or Chicago of 5.5 cents (as it was at that time) was less than the out-of-pocket cost of the Belt Line, even after being readjusted to take into account certain switching savings which would reduce the New York Central's out-of-pocket costs (J.S.M. App. E, p. 27a). He therefore denied the rail carriers' request for fourth-section relief.

The Commission reversed the examiner. It stated that the inbound proportional rate from origins on the Belt Line to Kankakee or Chicago "has no independent existence, but is an integral part of the rate which applies on the through transportation from Belt origin" to the east (J.S.M. App. C, p. 450). The Commission said that no useful purpose would be served in a fourth-section proceeding by determining whether each of the component parts of the rate was reasonably compensatory. It reasoned that, if it were to deny fourth-section relief because of a finding that the inbound proportion was not reasonably compensatory, even though the through combination was, the railroads could cure the defect by merely refiling a new through-rate eliminating the proportional rates. Thus, the Commission said that "condemnation based on finding the inbound proportional only to be noncompensatory would be tantamount to condemnation arising out of the method of publication" (*id.* at p. 450).

The Commission therefore granted the fourth-section relief requested by the New York Central and its connecting carriers (J.S.M. App. D, pp. 4a–5a).

4. *District Court Proceedings.*—Appellants, Mechling Barge Lines, Inc. and several grain operators, brought an action in the district court to enjoin the order of the Commission. They alleged that the Commission's authorization of fourth-section relief was improper because the proposed rates were not compensatory, were destructively competitive, and did not preserve the inherent low-cost advantage of the barge lines in violation of Section 4 and of the National Transportation Policy. They also alleged that the Commission erred in refusing to permit cross-examination concerning discrimination against barge transportation in violation of Section 3(4). The Chicago Board of Trade was permitted to intervene as plaintiff and it challenged the Commission's order on the ground that the rates were unduly prejudicial against shippers and localities in violation of Section 3(1).

The district court entered its judgment dismissing the complaint on September 18, 1962 (J.S.M. App. B, p. 2a). It held that the Commission did not have to consider whether the proposed rates violated any other section of the Interstate Commerce Act in a Section 4 proceeding (J.S.M. App. A, p. 4a); that there was substantial evidence to support the Commission's finding that a "special case" for the departure from Section 4 existed (*id.* at 6a); and that the rate was not lower than necessary to meet competition (*id.* at 6a–7a). It also upheld the Commission's determination that the combination rate and not the proportional rate from origins on the Belt Line to Kankakee or Chicago was the relevant one to examine in determining whether the proposed rate was reasonably compensatory (*id.* at 6a).

ARGUMENT

The issues presented by this case raise several substantial questions in the administration of the Interstate Commerce Act warranting plenary argument before this Court.

1. The Commission's decision to refrain from deciding the issues of undue discrimination against Chicago grain interests, in violation of Section 3(1) of the Interstate Commerce Act,[5] and discrimination against connecting barge carriers, in violation of Section 3(4) of the Act, raises a serious question. The Commission should of course be allowed considerable discretion in determining its procedures and in handling its own docket. Nonetheless, in the *Intermountain Rate Cases*, 234 U.S. 476, 485–486, this Court said that the Commission's power to relieve carriers from the requirements of Section 4 of the Act:

> * * * is made by the statute to depend upon the facts established and the judgment of that body in the exercise of a sound legal discretion as to whether the request should be granted compatibly with a due consideration of the private and public interests concerned and in view of the preference and discrimination clauses of the second and third sections.

The Court has never given any indication, contrary to this statement, that the Commission may ignore

[5] After stating that questions of discrimination are not involved in fourth-section proceedings, the Commission did suggest that Chicago was not being discriminated against. However, this afterthought does not seem to be a finding fully considering and rejecting the Section 3(1) contentions on their merits.

the matter of possible discrimination in violation of Section 3 when granting fourth-section relief.

Moreover, a strong argument may be made that sound administrative practice requires the Commission to consider whether Section 3 has been violated so that a proposed rate which violates the policy of the statute may be stricken down at the earliest opportunity. There is little reason in the ordinary case, the argument continues, to require that an additional proceeding be instituted to consider the issue of discrimination.

2. Assuming that the Commission is not bound by statute to consider alleged violations of Section 3 in a fourth-section proceeding, the possibility of unfair administrative procedure must be considered. The Commission had said that it deemed undue discrimination in violation of Section 3 to be relevant in Section 4 proceedings in a long line of cases (see J.S.C. App. F), including one decided in 1959, the year before the Commission's order was issued in this case and after the decision in *Seatrain Lines, Inc.* v. *United States,* 168 F. Supp. 819 (S.D. N.Y.), upon which the railroads have principally relied. Since the appellants were given no warning prior to the hearing that the Commission would not consider their allegations under Section 3, it is arguable that appellants were warranted in assuming that they might raise such issues without having to file a formal complaint under Section 13 of the Act.

3. The Commission's determination that the rates were reasonably compensatory also raises substantial questions. The Commission's decision that the pro-

posed rates met the "reasonably compensatory" test of Section 4 is based on its determination that the inbound proportional rate to Kankakee or Chicago had no independent existence, and that, in any event, the applicant railroads could have achieved the same result by filing a single factor rate for shipments from origins on the Belt Line to the east.

Section 4, 49 U.S.C. 4, states that "the Commission shall not permit the establishment of *any charge* to or from the more distant point that is not reasonably compensatory" (emphasis added). This language may indicate that the Commission must look to each factor of the rate as filed—an approach which would seem to encompass the inbound proportional rate from origins on the Belt Line to Kankakee or Chicago. If this is so, the Commission order is defective, for the Commission made no finding as to whether the inbound proportional is compensatory, and the hearing examiner specifically found that it was not (J.S.M. App. E, pp. 27a, 29a, 30a). However, the New York Central argues that the words "to or from the more distant point" should be read to mean the charge to the eastern destinations, since the purpcse of Section 4 is to prevent discrimination against intermediate points, and the only fourth-section departures occur on shipments from Kankakee and points north, south, and west of Kankakee to the east. The problem of statutory construction thus posed is not free from doubt, although the Central's argument may be more consistent with the purpose of Section 4.

There is greater difficulty with the Commission's argument that the inbound proportional rate should be ignored in determining whether the proposed rate was reasonably compensatory because the applicant rail carriers could and would file a single factor rate from the origins on the Belt Line to the east if they were denied fourth-section relief. Aside from any practical reasons which might prevent the rail carriers from filing a single factor rate, approval of such a rate might not be granted. For example, as we discuss below (pp. 15–17), it might be inconsistent with the National Transportation Policy. The appellants, if such a rate were filed, would have the opportunity to challenge this single factor rate and raise any objections which they might have. As it is, the Commission has approved the proposed rate because it deems it to be the same as another rate, but no one has had an opportunity to attack the hypothetical rate. This Court has no basis upon which to decide whether this non-existent rate would be valid if filed, and it is doubtful that appellants should have the burden of conjuring up possible defects in a hypothetical rate at this time.

4. Finally, the case may well present a serious question as to the validity of the proposed rates under the National Transportation Policy. Although the facts are not clear, there may be basis for arguing that the purpose and effect of the proposed rate are to divert traffic from competing barge lines while decreasing the net revenue of the railroads. There is no finding that the railroads will carry any greater amount of

corn products east of Chicago and Kankakee under the proposed rate. The only additional rail traffic that the proposed rate would appear to generate is from the points on the Belt Line to Kankakee and Chicago, traffic which the hearing examiner found to be bringing in revenue "somewhat less" than the out-of-pocket costs of the New York Central (J.S.M. App. E, p. 27a). Therefore, the logical inference from the hearing examiner's finding (which was not overruled by the Commission) is that the railroads are taking traffic from the barge lines by charging rates at which the railroads lose money. This would be contrary to the National Transportation Policy's prohibition against destructive competition and its admonition to the Commission to recognize the inherent advantages of each mode of transportation. See *Interstate Commerce Commission* v. *The New York, New Haven and Hartford R.R. Co.*, Nos. 108, 109, 110, and 125, this Term, decided April 22, 1963.

The Commission did state that the Central's revenue position would be increased more than 5.5 cents per hundred pounds which the new tariffs set as the rates for shipments to Chicago or Kankakee. The Commission said that, in addition, the proposed rates encouraged corn shipments from origins on the Belt Line directly to the east via Kankakee, instead of proceeding from the origins to Chicago to Kankakee and the east. The old combination rates, which were lower than the separate local rates, did not apply to shipments moving directly from the origins to

Kankakee and then to the east without passing through Chicago, while the new rates applied to shipments moving through either Chicago or Kankakee. The New York Central would save, as to corn products moving under the new rates to Kankakee without going to Chicago, a 2-cent switching cost and the cost of a 37.7 mile longer haul resulting from the transshipment of corn from Chicago to Kankakee and then east (J.S.M. App. C, p. 449).

The Commission's findings, however, are incomplete on this point, because no appraisal was made as to the volume of traffic which had previously moved southward from Chicago to Kankakee and then east, as compared to the volume following that course after the rate change. In short, the Commission did not make a finding that the gross dollar revenues received under the new rate, plus the actual dollar volume of savings, amounted to more than the Central's loss in carrying the grain from Belt Line points to Kankakee. Findings on this subject would be necessary in order to determine the net effect of the changed rates on New York Central's revenue position.[6]

[6] Appellants in No. 746 also raise an additional issue as to whether there is substantial evidence to support the finding that a "special case" exists authorizing the proposed rates in question. We do not believe that any real issue is presented as to whether "compelling competition" warranting the finding of a special case exists. The record shows clearly that virtually all rail traffic from points on the Belt Line to Chicago and Kankakee had been diverted from the railroads to the barges.

CONCLUSION

Without suggesting that the decision below should be reversed, we respectfully submit that the Court should note probable jurisdiction and set these cases for argument.

ARCHIBALD COX,
Solicitor General.
LEE LOEVINGER,
Assistant Attorney General.
ROBERT B. HUMMEL,
GERALD KADISH,
Attorneys.

MAY 1963.

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 746

A. L. MECHLING BARGE LINES, INC., A CORPORATION, IRA BOOKWALTER, CULLOM COOPERATIVE GRAIN COMPANY, CHARLES TREASURE, GRISWOLD GRAIN COMPANY, AND MAZON FARMERS ELEVATOR, APPELLANTS

v.

UNITED STATES OF AMERICA, AND INTERSTATE COMMERCE COMMISSION, APPELLEES

No. 747

BOARD OF TRADE OF THE CITY OF CHICAGO, APPELLANT

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE NEW YORK CENTRAL RAILROAD COMPANY, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, Appellee Interstate Com-

merce Commission moves that the judgment of the district court be affirmed.[1]

STATEMENT

This is a direct appeal from a final judgment entered on September 18, 1962, by a three-judge district court convened pursuant to 28 U.S.C. 2284, 2325, dismissing a complaint seeking to set aside and enjoin an order of the Interstate Commerce Commission entered June 8, 1960, in Fourth Section Application No. 33955, *Corn and Corn Products from Illinois to Official Territory*, 310 I.C.C. 437.[2]

The New York Central Railroad Company operates a rail line between Kankakee, Illinois and Moronts, Illinois called the Kankakee Belt Line. The Belt Line is about 80 miles long, and roughly parallels the Illinois River. Appellant A. L. Mechling Barge Lines, Inc. operates on the Illinois River and transports a substantial amount of corn from the adjacent territory to Chicago where it is reshipped to eastern destinations. Corn constitutes the major traffic available to the Belt Line from the surrounding area. (M.J.S. App. C pp. 440–448).[3] The transportation rate is one of the important factors which determines whether the corn is moved to the river for shipment

[1] This motion to affirm is filed at the request of the Court made April 15, 1963.

[2] The order of the Commission resulting from this proceeding is designated as Fourth Section Order No. 19346, *Corn and Corn Products from Illinois to Official Territory*.

[3] M.J.S. refers to jurisdictional statement of appellant A. L. Mechling Barge Lines, Inc.

B.J.S. refers to jurisdictional statement of appellant Board of Trade of the City of Chicago.

by water carrier such as appellant Mechling, or to a country elevator for shipment by rail.

As a direct result of the development of commerce on the Illinois River beginning about 20 to 25 years ago, there was a drastic diversion of grain and corn traffic originating in the territory adjacent to the Belt Line, from the all-rail route to the barge-rail route via Chicago, Illinois. Thus, the Commission found that "In 1935, 1940 and 1957, respectively, about 1.5, 19, and 59 million bushels of grain including 0.7, 16, and 34 million bushels of corn, moved by barge from all Illinois River ports to Chicago." (M.J.S. App. C, page 440). Most of the corn moved by barge originated at ten river ports on the Illinois River which compete with the Belt Line stations. In comparison to the enormous increase in the barge movement of grain and corn, only a nominal amount moved over the Belt Line. "During 1954, 1955, and 1956, respectively, 467, 729, and 615 carloads of grain including 305, 533, and 464 carloads of corn originated thereat.[4] Most of it was Commodity Credit Corporation corn [government controlled] which is usually shipped by rail for export, and is not subject to the same competitive forces as 'free' corn." (M.J.S. App. C, p. 440).[5] The export rates are lower than the combination domestic rates. (M.J.S. App. C, p. 448).

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[4] Corn averages about 50 pounds to the bushel. A carload of corn based upon 100,000 pounds equals 2,000 bushels. The average number of bushels of corn moved during the years 1954, 1955, 1956 amounts to 868,000 bushels.

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[8] As a direct result of the great disparity between the water and rail rates, country elevator operators located near or on the Belt Line watched the corn go past their doors down to the

The determinative factor in the selection of the mode of transportation prior to December 15, 1956, was the much lower local barge rate of approximately 4.625 cents applicable from competing river ports to Chicago compared with the flat rate of 23 cents from stations on the Belt Line to Chicago.* Although the reshipping rate on corn products from Chicago and Kankakee is the same, *i.e.*, 49.5 cents, the barge-rail combination produced a rate of 54.125 cents compared to the much higher combination all-rail rate of 72.5 cents. Hardly any corn traffic could be attracted to the Belt Line under such rate conditions, and the all-rail rate simply became a "paper" rate.

In an effort to revive the Belt Line's participation in the corn traffic, The New York Central in December 1956 established a competitive proportional rate of 5 cents (now 6 cents because of general rate increases) minimum 100,000 pounds applicable on corn and corn products when milled in transit from Belt

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river. The status of the country elevator operators changed to buyers or merchandisers of corn for barge movement. (M.J.S. App. C, pp. 441-442, 451). The lack of competitive rail rates tended to give the water carriers a monopoly on the movement of the considered traffic. This seriously affected the farmers since they were deprived of the benefits resulting from competitive bids. After the new rate became effective farmers received much more than they had received previously. For example, a farmer at the country elevator located at Blair, Illinois received at least 8.75 cents a bushel more for his corn than he was able to obtain prior to the effective date of the challenged rate. (M.J.S. App. C, p. 445.)

*The rate diagrams at p. 6 of the Board of Trade's jurisdictional statement conveniently omits any reference to the lower local barge rates. However, these rates are discussed by the Commission in its report. (M.J.S. App. C, pp. 439-440.)

Line stations west of Kankakee to Kankakee for final destination at points east of the western termini of eastern trunk line carriers.[7] The proportional rate had no independent application but could only be used in conjunction with the existing reshipping rates beyond Kankakee as a factor in determining the ultimate through rates on corn products.[8] The lawfulness of the new proportional factor was not challenged and it became effective as scheduled. The rates have been in effect for 5½ years.

Initially it was believed that any departures from the long-and-short haul provisions of section 4(1) of the Interstate Commerce Act, 49 U.S.C. § 4(1) resulting from the application of the new proportional rate would be covered by existing Fourth Section Orders of the Commission. However, it was subsequently discovered that this was not the case and that additional authority was necessary. On June 27, 1957, the New York Central filed an application for fourth section relief with the Commission. The relief requested would permit the continuance or establishment and maintenance over existing all-rail routes, of reduced rail rates consisting of a combination of proportional rates from origins west of Kankakee on the

[7] This would include points in New York, Pennsylvania, West Virginia, the New England States, Delaware, the District of Columbia, Maryland, New Jersey and Virginia.

[8] A "proportional rate" is a part of a through rate, *Hocking Valley Ry. Co.* v. *Lackawanna Coal & Lumber Co.*, 224 Fed. 930, 931, and is a rate dependent for application upon (1) a previous transportation to the point from which the proportional rate applies or (2) a subsequent transportation from a point to which the proportional rate applies, (3) or both, cf. *Addy* v. *Michigan Central R. Co.*, 269 I.C.C. 683, 686.

Belt Line to points in the territory noted in footnote 7, *supra*, and to charge higher rates at intermediate points which are not subject to the same competitive forces. The application also was intended to cover a subsequent rate revision, effective August 29, 1957, designed to eliminate unauthorized destination departures. (M.J.S. App. C, p. 439).

In accordance with the Commission's established initial rate procedure, the appellants filed protests against the fourth section application urging that the relief be denied. In addition, the appellants challenged the lawfulness of the proposed rate revision effective August 29, 1957 under other sections of the Interstate Commerce Act such as sections 1 and 3. They requested that the Commission invoke its discretionary investigation and suspension authority under section 15(7) of the Interstate Commerce Act, 49 U.S.C. § 15(7). The New York Central filed a reply to the protests.[8]

The matter of the fourth section application received initial consideration by a board of employees of the Commission known as the Fourth Section Board. The requests for investigation and suspension of the proposed rate revision were given initial consideration by another board of employees called the Board of Suspension.

The Board of Suspension, acting first on August 26, 1957, decided not to institute an investigation and to suspend the proposed rate revision. The notice

[8] Significantly the Commission received two dozen letters and telegrams from grain and elevator companies and local banks in support of the competitive all-rail rate revision.

of the Board of Suspension specifically states *"This action does not constitute approval of the protested schedules. They may be made subject to investigation through formal complaint filed in accordance with the Commission's Rules of Practice."* [10] Upon the completion of its investigation, the Fourth Section Board entered a fourth section order on August 27, 1957, granting the relief sought pending a hearing. The order of the Fourth Section Board also stated *"The Commission does not hereby approve any rates that may be filed under this authority, all such rates being subject to complaint, investigation and correction if in conflict with any provision of the Interstate Commerce Act."* [11] [12]

The appellants filed petitions for reconsideration of the action of both Boards. On August 27, 1957, Division 2 of the Commission acting as an Appellate upheld the action of the Board of Suspension by voting not to suspend the protested rate revision, and a notice to that effect was issued on the same date. The notice reminded the protestants that *"The action*

[10] Such a complaint may be filed with the Commission at any time—even today—under the authority of section 13(1) of the Interstate Commerce Act, 49 U.S.C. § 13(1).

[11] This clause usually concludes a fourth section order to place interested persons on notice that the rates established and maintained under the authority may be challenged in an appropriate complaint proceeding before the Commission. See *Intermountain Rate Cases* 234 U.S. 476, 493.

[12] The validity of the temporary fourth section order is not in issue here. Cf. *A. L. Mechling Barge Lines, Inc.* v. *U.S. and I.C.C.*, 368 U.S. 325 (1962). The fourth section order which is the subject of this appeal is based upon a full hearing and a report containing complete findings.

of the Board of Suspension and of Division 2 does not constitute approval of the protested schedules." The following day, August 28, 1957, the same Division of the Commission sustained the action of the Fourth Section Board. A notice of the Commission dated August 28, 1957, announcing action of Division 2 was issued and it also informed the protestants that *"The action of the Fourth Section Board and of Division 2 does not constitute approval of the rates. They may be subject to an investigation through formal complaint in accordance with the Commission's Rules of Practice."*

Although the appellants could have followed the advice of the Commission and filed a formal complaint against the 6-cent proportional rate factor, the appellants elected to challenge the Commission's action in court. On November 29, 1957, a three-judge statutory district court issued its order dismissing the complaints for lack of jurisdiction.[13]

In the meantime, the Commission set the rail carriers' application for fourth section relief for hearing before an examiner. Hearing was held January 29, 1958, through February 4, 1958, in which appellants fully participated.

On March 11, 1959, the report of the examiner was issued. Although the examiner recommended that the application be denied,[14] he recognized the need for a

[13] The case is entitled *A. L. Mechling Barge Lines, Inc., et al.* v. *United States and I.C.C.* et al., C.A. No. 57 C. 1450, U.S.D.C. N.D. Ill. E. Div. The position of the defendants in this case was that the plaintiffs had not exhausted their administrative remedies.

[14] The examiner recommended that the application be denied on the theory that the 6-cent proportional rate factor of the through rate, standing alone, was not reasonably compensatory.

rail rate adjustment to restore competition in this corn producing area, and that the adjustment would require fourth section relief.[13] With respect to Board of Trade's allegations of discrimination, the examiner held that "these issues [allegations] do not directly deal with the fourth-section principles here involved, but are properly matters which may be raised in investigation or complaint proceedings." (M.J.S. App. E, p. 27a). Thus, appellant Board of Trade was again reminded of the appropriate procedure to be followed in seeking relief.

After the filing of exceptions and replies to the examiner's recommended report and upon the request of several of the parties, Division 2 of the Commission heard the parties in oral argument on October 29, 1959. Thereafter, the report of June 8, 1960, the subject of this appeal was issued by Division 2 which granted the application for fourth section relief. The accompanying Fourth Section Order No. 19346 states in part *"The Commission does not hereby approve any rates filed under this authority, all such rates being subject to complaint, investigation, and correction if in conflict with any provision of the Interstate Commerce Act."* (M.J.S. App. D, pp. 4a–5a.)

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[13] The examiner found that "It is clear that the competitive situation which prevailed prior to the proposed rate between the all-rail and the barge-rail rates on corn from the northern Illinois territory to the East required an adjustment in the all-rail, and that such an adjustment requires fourth section relief (M.J.S. App. E, pp. 27a–28a). Significantly, even the appellants acknowledged that the prevailing all-rail rate had to be reduced before the Belt Line could participate in the traffic (M.J.S. App. E, p. 30a).

Petitions for reconsideration of the report and order of Division 2 were denied by the Commission on November 18, 1960.[16]

In granting the application for fourth section relief, the Commission specifically found "that applicants have shown a special case within the meaning of section 4 of the act, by virtue of actual and compelling competition; that the proposed rates are not lower than necessary to meet that competition, do not constitute a destructive competitive practice, are reasonably compensatory, and will not impose an undue burden on other traffic" (M.J.S. App. C, p. 452). The finding, that the proposed rates were reasonably compensatory, was based upon the entire through rate from origins on the Belt Line to ultimate destinations in the east on the ground that the proportional "rate factor has no independent existence, but is an integral part of the rate which applies on the through transportation, from Belt origin, through the milling-in-transit point, to delivery of the corn product at its ultimate destination" (M.J.S. App. C, p. 450).[17]

Of primary significance in this case is the fact that pending the proceedings before the Commission, it had

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[16] In denying the appellants' petition for reconsideration, the Commission held that "the matters submitted in support thereof do not constitute substantial and material grounds to warrant reopening of this proceeding for reconsideration and reargument."

[17] In this connection, it must be noted that no fourth section departures occur on the inbound movement to a transit point such as Kankakee or Chicago. It is only when the reshipping rate is added to the inbound proportional rate to determine the through rate that the fourth section departures occur.

the opportunity to observe the effect of the 6-cent proportional rate effective December 15, 1956, upon the traffic of the competing barge line. Despite the restoration of effective competition, there was a substantial increase in the barge traffic to Chicago during the period December 15, 1956, to August 30, 1957, of about 90,000 tons over a corresponding period for the previous year. However, there was also a substantial increase in the amount of rail traffic originated on the Belt Line for a similar period.[13] After analyzing the corn movements in the Belt Line territory, the Commission was able to conclude that the new all-rail through rates attracted corn grown near the rail lines to the rails, whereas, corn grown in proximity to the river continued to be shipped by barge (M.J.S. App. C, p. 452).

The district court after careful review of the Commission's report concluded that the assailed order fell within the statutory power of the Commission, that its findings and conclusions were supported by substantial evidence of record, and that no prejudicial error occurred in the hearings before the examiner and the Commission (M.J.S. App. A, p. 8a).

The allegations of discrimination were discounted by the Commission when it pointed out that the proposed rates apply "from Belt points to eastern desti-

[13] For the period December 15, 1955–August 30, 1956, the barge shipments to Chicago amounted to 402,105 tons. It rose to 493,668 tons for the same period the following year. The 6-, 8-, and 12-month periods ending June 30, August 31, and December 31, 1957, show that Belt Line traffic progressively increased from 1,915 carloads of corn to 2,681 carloads (M.J.S. App. C, pp. 440–441, 452).

nations via either Kankakee or Chicago," (M.J.S. App. C, p. 449) and that "since the proposed rates are effective over Chicago, that point has the same stature as all other corn-processing points in official territory in their application" (M.J.S. App. C, p. 451). Although the Commission considered the allegations of discrimination raised before it and found them without merit, nevertheless, the district court held that Commission is not required to go beyond the statutory requirements of section 4 to make ultimate findings that "a rate is lawful and not discriminatory." (M.J.S. App. A, p. 4a.) In this respect, the district court held that the allegations of discrimination should have been raised under the complaint provisions of section 13(1) of the Interstate Commerce Act, 49 U.S.C. section 13(1) which is appropriate for that purpose (M.J.S. App. A, p. 4a)."

ARGUMENT

This case presents no substantial question warranting plenary consideration by this Court.

1. Pursuant to the provisions of section 4 of the Act, rail and water carriers subject to the Act are prohibited from charging or receiving from shippers, "any greater compensation in the *aggregate* for the transportation * * * like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance." (Italic sup-

[10] As of this date appellants have not filed a complaint against the rates filed under the permissive fourth section order of the Commission.

plied.) This is not intended to be an absolute and inflexible rule preventing the restoration of competition between competing carriers.[20] Indeed, the provisions of section 4 also enable a carrier affected by a transportation imbalance to seek its correction by the establishment of reduced rates applicable to critically competitive points on the long haul movement, while maintaining higher rates at the intermediate points which are not subjected to the same competitive forces. *Skinner & Eddy Corp.* v. *United States*, 249 U.S. 557, 568 (1919). Thus, Congress has provided in section 4, "That upon application to the Commission after investigation, such carrier, in *special cases* may be authorized to charge less for longer than for shorter distances for the transportation of * * * property * * * but in exercising the authority conferred upon it in this proviso the Commission shall not permit the establishment of any charge *to or from the more distant point* that is not *reasonably compensatory* for the service performed" (Italic supplied). Section 4 also prohibits the Commission from approving an application for fourth section relief "on account of merely water competition not actually in existence."

By the terms of section 4, the necessity to meet water carrier competition is recognized as a *special* case. See also *In Re Louisville & Nashville R. R. Co.*, 1 I.C.C. 31, 78; *Intermountain Rate Cases*, 234 U.S.

[20] See Report of the Senate Select Committee on Interstate Commerce (Cullum Report), 49 Cong. 1st Sess. 1886, Vol. 1, pp. 195–198; and *In re Louisville & Nashville R.R. Co.*, 1 I.C.C. 31, 78 (1887).

476; *Skinner & Eddy Corp.* v. *United States*, 249 U.S. 557, 568; *Transcontinental Cases of 1922*, 74 I.C.C. 48. The record in this case demonstrates beyond doubt that there has been a substantial shift of traffic from the rail line to the barge lines operating on the Illinois River, to the extent that rail shipments of corn became almost non-existent. It was not simply water competition as Mechling alleges (M.J.S., p. 13) which justified the designation of this case as a "special" case, but it was water competition which resulted in the practical elimination of the Belt Line's participation in the corn traffic which justified the finding of the Commission.

The purpose of section 4 is to preserve competition, *Skinner & Eddy Corp.* v. *United States*, *supra*, and as the report of the Commission shows, competition between the rail and river transportation services which had disappeared, has been revived. All of the parties before the Commission, including the appellants, recognized that the all-rail rates had to be reduced if any corn traffic was to be attracted to the Belt Line. The only real question before the Commission was the level at which the rates were to be pegged. The Commission found that the proposed reduced all-rail rates were not lower than necessary to meet competition, and that they did not constitute a destructive competitive practice. The district court correctly held that there was substantial evidence of record to support these findings. (M.J.S. App. A, p. 8a).

Significantly, and as the district court noted (M.J.S. App. A, p. 8a) the "Commission had before

it evidence of the amount of corn shipped via the two modes of transportation in the period here in question." This evidence conclusively showed that the Belt Line, the farmers and the elevator operators in proximity to the Belt Line benefited substantially from the competitive all-rail rate, and at the same time, the barge lines not only retained their traffic, but enjoyed a sizeable increase as well. Certainly, this kind of competition cannot be labeled as "competition that kills;" *Skinner & Eddy Corp.* v. *United States,* 249 U.S. 557 at p. 568; nor can it be shown to violate either the express terms or the spirit of the National Transportation Policy, 49 U.S.C. preceding section 1. In this respect there is no substance to the appellants' allegations that the Commission action which resulted in the preservation of competition, is contrary to the National Transportation Policy.

2. In answer to the Board of Trade's allegation that the competitive all-rail rate unduly prejudiced Chicago in violation of section 3(1) of the Act, 49 U.S.C. section 3(1), the Commission expressly found that "the proposed rates apply from Belt points to eastern destination via either Kankakee or Chicago," and that "since the proposed rates are effective over Chicago, that point has the same stature at all other corn-processing points in official territory in their application." (M.J.S. App. C, pp. 449, 451.) This simply means that the Chicago shipper has available to it on corn milled-in-transit the same all-rail through rate of 54.5 cents for shipments from origins on the Belt Line via Chicago to eastern desti-

nations as the shipper which prefers the more direct route through Kankakee. The fact that the shipper at Chicago and at Kankakee receive equal treatment under the competitive all-rail through rate is clearly demonstrated by the Board of Trade in its third rate diagram (B.J.S., p. 6) which shows that on corn originating at Streator, Illinois, destined to New York, the same through rate of 54.5 cents applies whether the corn is milled-in-transit at Kankakee or Chicago.

The Board of Trade expressly admits that the Commission's findings of equal treatment are "technically correct." (B.J.S., p. 9). The only reasonable interpretation which can be placed upon its use of the phrase "technically correct" is that it is *legally correct.*

In view of the Board of Trade's admission that the Commission's findings are correct, its allegations that the Chicago grain interests are seriously injured (B.J.S., pp. 8-9), are completely without merit. The Board of Trade's third rate diagram (B.J.S., p. 6) shows that the same rail rate of 72.5 cents applied on whole corn shipments from Belt Line origins via Chicago and via Kankakee. Thus, as between the shippers of whole corn there is complete equality in the rail rates.

However, the Board of Trade omitted any reference to the much lower barge-rail rate applicable to Chicago which is not subject to the milling-in-transit limitation. In this respect, the Chicago grain dealers have a decided advantage over the Kankakee shippers.

Assuming the reverse situation to be true there might be some grounds for complaint. But where, as here, little or no corn moves on the 72.5 cent rail rate over the Belt Line, the Board of Trade is hardly in any position to claim that the Chicago grain dealer is unduly prejudiced. This is equally true of the Board of Trade's allegation that the routes over Kankakee are not as open and flexible as those available out of Chicago on the Chicago combinations. In addition, the mere fact that the application of competitive all-rail through rates results in a higher rate on whole corn is not, standing alone, a violation of the provisions of section 3(1) of the Act. *Interstate Commerce Commission* v. *Chicago Great Western Railway Company*, 209 U.S. 109 (1908).

The Commission found that all of these allegations by the Board of Trade "do not directly deal with the fourth section principles here involved, but are properly matters which may be raised in investigation or complaint proceedings." (M.J.S. App. C, p. 451). The district court after considering the same allegations, as well as the appellants' argument, that the Commission could not grant the application under section 4, if to do so involved violation of the other sections of the Act, upheld the action of the Commission (M.J.S. App. A, p. 4a). The district court properly held that in an application proceeding limited to the standards of section 4 of the Act "the Commission is not required to make specific ultimate findings that a rate is lawful and not discriminatory" (M.J.S. App. A, p. 4a). Accordingly, the district

court concluded that the appellants had not been prejudiced by the exclusion of evidence which went beyond the requirements of section 4 of the Act, and that the appellants could have availed themselves of the remedies provided in section 13(1) and 15(1) of the Interstate Commerce Act, 49 U.S.C. section 13(1) and 15(1).[n] (M.J.S. App. A, pp. 3a–4a). Neither the record before the Commission nor the allegations of the Board of Trade indicate any violation of the provisions of section 3(1) of the Act. In this respect this case conforms to prior Commission cases in which it has declared that it would not grant applications for fourth-section relief where such relief results in infractions of other sections of the Act.

When the proposed all-rail rate adjustment was originally filed with the Commission in 1956 and 1957, the Commission pursuant to its discretionary authority in section 15(7) of the Interstate Commerce Act, 49 U.S.C. section 15(7), could have instituted an investigation into lawfulness of the proposed rates under other pertinent sections of the Act. In that event, it is the Commission's practice to combine such an investigation with the hearing on the application for fourth section relief. *Mississippi Railroad Commis-*

[n] The Board of Trade points out that, contrary to the district court's statement, the Commission had not excluded the evidence which was submitted to show that Chicago was unduly prejudiced by the proposed rate adjustment. This distinction is immaterial in view of the district court's conclusion that the appellants had not availed themselves of the appropriate statutory remedies and that they were not prejudiced by the action of the Commission.

sion v. *Alabama & Vicksburg Railway Company*, 120 I.C.C. 569, 573 (1927)."[22] Since the preliminary record before the Commission during the initial rate proceedings failed to justify the Commission taking such action, no investigation under sections 15(7) and 15(1) was ordered. Accordingly, there remained only the matter of the fourth section application for hearing.

However, the refusal of the Commission to institute a section 15 investigation, did not prevent the appellants from pursuing their remedies under section 13(1) of the Act by filing a complaint with the Commission and placing in issue their allegations of unlawful discrimination. Had this been done, the complaint proceeding would have been combined for hearing with the fourth section application. In these circumstances the district court's opinion is fully in accord with established precedent in *United States* v. *Merchants & M. Traffic Ass'ns*, 242 U.S. 177, 188 (1916); *Seatrain Lines* v. *United States*, 168 F. Supp. 819 (D.C. N.Y. 1958, 3 judge); *Koppers Co.* v. *United States*, 132 F. Supp. 159 (D.C. Pa. 1955, 3 judge); *Florida Citrus Commission* v.

[22] The Commission stated in this report at p. 573: "* * * It is desirable in the interest of economy of time and expense, wherever practicable, to hear and dispose of fourth-section applications in connection with formal complaints or investigations involving the same rate under other sections of the act. For that reason these portions of application No. 373 were set for hearing with certain of these cases. This policy has been followed for a number of years. So far as practicable it will be adhered to in the future, and we shall expect carriers to be ready to proceed in support of their fourth-section applications at the time set. * * *"

United States, 144 F. Supp. 517 (D.C. Fla. 1956, 3 judge) aff'd per curiam 352 U.S. 588. Merely because the appellants consider the statutory remedies and the Commission's time-tested procedures as "dryly technical formality" (M.J.S. p. 21) is not enough to justify circumvention of the established and appropriate remedies.[20] Appellants are only entitled to the right of redress by an effective procedure, *Gibbs* v. *Zimmerman*, 290 U.S. 326, 332. This has been provided by Congress in section 13(1) of the Act and the Commission's Rules of Procedure, 49 C.F.R. section 1.1 *et seq.* The court below correctly held that the appellants are required to adhere to statutory remedies.

The foregoing discussion applies with equal force to the allegations of section 3(4) discrimination made by Mechling which are of no greater merit than those advanced by the Board of Trade. (M.J.S., p. 19.) Mechling's allegations of a section 3(4) violation arising out of divisions of rates between connecting rail carriers at Chicago (M.J.S., p. 8), only one of a group of routes over which the proposed rates apply, is too remote from the issues presented by a section 4 application. In fact, many of the routes to which the rate applies do not go via Chicago. Clearly, divisions of rates between connecting carriers are completely disparate from the purpose of section 4 which is to prevent undue prefer-

[20] It should be noted that upon the filing of a complaint with the Commission, the burden of proving the allegation of discrimination would be on the appellants. *Koppers Company, Inc.* v. *United States*, 166 F. Supp. 96 (1958).

ence from "the charging of a less or an equal rate from longer haul or route," *Texas & Pacific Ry. Co.* v. *United States*, 289 U.S. 627, 638, than for a shorter haul, and thereby unduly prejudicing shippers and localities at the intermediate points. *United States* v. *Merchant & M. Traffic Ass'ns*, 242 U.S. 177; *Seatrain Lines* v. *United States*, 168 F. Supp. 819.

In all of the cases cited by the appellants in which the Commission has stated that in granting section 4 relief that consideration should be given to the provisions of sections 2 and 3, this statement was made in relation to the affect of the relief upon intermediate shippers and localities and competing shippers. Indeed, this Court's opinion in the *Intermountain Rate Cases*, 234 U.S. 476, is not to the contrary. We know of no case in which the Commission has denied fourth section relief because of alleged violations of section 3(4). Since the issues under section 3(4) are completely extraneous to the section 4 issues, i.e., whether a "special case" exists and whether the proposed rates are "reasonably compensatory" it was not error on the part of the Commission to exclude matter arising under section 3(4).

3. Since it was evident that a special case existed, the only remaining issue to be disposed of by the Commission was whether the reduced through charges applicable to the long-haul movement from Belt Line origins to eastern destinations were reasonably compensatory. In order to resolve this question, the Commission based its determination on the through rate rather than the 6-cent proportional rate factor because, as the Commission found, "that rate factor

has no independent existence, but is an integral part of the rate which applies on the through transportation from Belt origins, through the milling-in-transit point, to delivery of the corn product at its ultimate destination." (M.J.S. App. C, p. 450.) The 6-cent proportional rate factor has no independent application to shipments from the stations on the Belt Line to the transit points. No fourth section departures occur at points between Belt Line origins and the transit points. It is only after reshipment when the proportional rate factor is used to determine the through charge that fourth section departures occur."

Appellants' allegations that the Commission should have confined its consideration to the 6-cent inbound proportional rate is illogical. It is premised upon a distorted interpretation of the provision of section 4. The provisions of section 4 are intended to prevent carriers from engaging in discriminatory practices in which the long-haul shipper obtains a rate advantage over competing short-haul shippers. *Texas & Pacific Ry. Co.* v. *United States*, 289 U.S. 627, 638. Thus, the statute speaks in terms of "compensation in the aggregate" and "the establishment of any charge to or from the more distant point." The 6-cent proportional rate is neither the compensation in the aggregate charged for the longer distance, nor is it the charge to or from the more distant point."

"Appellants did not challenge the compensativeness of the through charges.

"In this respect, Fourth Section Order No. 19346 which accompanied the assailed report authorized the applicant rail carrier to establish the proposed rate adjustment from points on the Blackstone Belt Line to points in Central trunk line and New England territories. (M.J.S. App. D, pp. 4a–5a.)

The legislative history cited by Mechling does not lend any support to its allegations. (M.J.S., pp. 14–15.) In discussing his proposed amendment to section 4 which included the proviso for a "reasonably compensatory charge for the service performed," Senator Townsend concluded by noting that the Commission for all practical purposes was observing the requirements of the proposed amendment. 59 Cong. Rec., pp. 740, 741, Dec. 17, 1919. The rule observed by the Commission at that time and which is followed today is succinctly stated in *Proportional Rates to Gulf Ports for Export*, 44 I.C.C. 543 (1917) where the Commission said at p. 547:

> In view of all the circumstances we hold that the fourth section as amended in 1910 should be construed as applying to carriers participating in a through route; and that the through route, being considered as a unit, must be dealt with as such, and that the Commission has not exceeded its powers in granting the fourth section exemption herein involved. * * *

Shortly after the enactment of the 1920 amendment to section 4, the Commission in *Transcontinental Cases of 1922*, 74 I.C.C. 48, remarked at p. 70, "The amendment has made mandatory what theretofore rested in our sound discretion as to compensation for the service performed to the more distant point * * *."

The Commission found that the through rates were reasonably compensatory. In making this determination, the Commission considered evidence of comparative earnings, rate levels and operating conditions. (M.J.S. App. C, pp. 448–449). Pertinent to its de-

cision was the finding that under the proposed rates the New York Central's revenues are increased by 7.5 cents per 100 pounds over its prior method of handling corn, and that its expenses are reduced to the extent that corn from Belt origins can move direct to eastern destinations. (M.J.S. App. C, p. 449).

The ultimate findings of the Commission are in complete accord with the established criteria for the determination of a reasonably compensatory rate which the Commission set forth in *Transcontinental Cases of 1922*, 74 I.C.C. 48, 71 (M.J.S. App. A. p. 7a). The district court held that the Commission was correct in basing its decision on the through combination rate and not the 6-cent proportional rate factor, and that the Commission's findings and conclusions are based upon substantial evidence of record." (M.J.S. App. A, pp. 6a-8a.)

CONCLUSION

Since this appeal presents no issues warranting plenary consideration, the judgment of the court below should be affirmed.

ROBERT W. GINNANE,
General Counsel,
H. NEIL GARSON,
Associate General Counsel,
Interstate Commerce Commission.

MAY 1963.

" The suggestion by the Board of Trade that the present case is of far reaching importance because it has affected "at least in part" several section 15 rate investigation proceedings pending before the Commission is hardly enough to warrant further consideration by this Court.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 747

BOARD OF TRADE OF THE CITY OF CHICAGO,
Appellant,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE NEW YORK CENTRAL RAILROAD COMPANY, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF OF APPELLANT IN OPPOSITION TO MOTION TO AFFIRM FILED BY THE INTERSTATE COMMERCE COMMISSION

On May 15, 1963, long after the time for filing such motions had expired, the Interstate Commerce Commission, one of the appellees herein, filed with the Court a motion to affirm the judgment of the lower court. In its motion, the Commission stated (p. 2, footnote 1) that the motion was "filed at the request of the Court made April 15, 1963." On April 15, 1963, the clerk of the Court addressed a letter to the Solicitor General, a copy of which was sent to all counsel of record, requesting that he

respond to the jurisdictional statements in this appeal and in No. 746. In response to such request, a memorandum stating the views of the United States was filed on May 15, 1963. We do not understand that the clerk's letter of April 15, 1963, was a request to the Commission to file a motion to affirm. We have been advised by the clerk, however, that the Commission's motion will be received by the Court and that we should reply thereto. Most of the points raised by the Commission have already been dealt with in the jurisdictional statement and in the brief filed in opposition to the motions to affirm which were filed by other appellees. Additional comments on the part of appellant, however, may be helpful to correct some of the Commission's erroneous statements and to place in the proper perspective other statements of the Commission, particularly those based upon arguments of appellant which the Commission has quoted out of context.

In its statement (Mot., p. 7), the Commission emphasizes the provision contained in its order of August 27, 1957, granting temporary fourth-section relief, to the effect that "The Commission does not hereby approve any rates that may be filed under this authority, all such rates being subject to complaint, investigation and correction if in conflict with any provision of the Interstate Commerce Act."[1] This is a standard provision which the Commis-

[1] The Commission also places emphasis on statements contained in the notices issued by the Board of Suspension and Division 2, acting as an appellate division, declining to suspend the proposed rates, where it was indicated that such action "does not constitute approval of the protested schedules" and that such schedules "may be made subject to investigation through formal complaint." Such notices have no bearing on the issues here presented. If no fourth-section application had been involved, any party aggrieved by the Commission's failure to sus-

sion includes in orders granting fourth-section relief, temporary or permanent. The inclusion of such a provision in a fourth-section order granting temporary relief has never been regarded by litigants or by the Commission itself as constituting notice that the Commission, in passing upon the question of permanent relief, would not consider whether the proposed rates would be "in conflict with any provision of the Interstate Commerce Act." On the contrary, the cases cited in Appendix F of appellant's jurisdictional statement show that the Commission has always, up to now, taken the position that it would consider, in such a case, whether the proposed rates would violate section 3.

The arguments made in the Commission's motion concerning the question of discrimination against Chicago grain interests (Mot., pp. 15-17) indicate that counsel for the Commission are either attempting to divert attention from the real issues or that they do not understand the basis for the charge of such discrimination.[2] Reference

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(Footnote 1 continued)
pend would have had to file a formal complaint to bring the issues before the Commission. But, under section 4 of the Act, the Commission is required to conduct an "investigation." The Commission's representation (Mot., p. 7) that the temporary fourth-section order was issued "[u]pon completion of its investigation" is incorrect. The relief, by its own terms, was to continue only "until the effective date of the further order to be entered after hearing in fourth-section application No. 33955, as amended."

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[2] The Commission's first argument (Mot., pp. 12-15) that "The only real question before the Commission was the level at which the rates were to be pegged" simply begs the question. The question before the Court is whether the Commission, in granting fourth-section relief, can ignore everything except the "level" of the rates.

is made (Mot., p. 15) to the statement in the Commission's report that Chicago "has the same stature as all other corn-processing points in official territory." The motion then says (Mot., p. 16) that the Board of Trade "admits that the Commission's findings of equal treatment are 'technically correct,' " from which the Commission argues (Mot., p. 16) that appellant's "admission that the Commission's findings are correct" shows that appellant's "allegations that the Chicago grain interests are seriously injured . . . are completely without merit."

The Commission's quotation from appellant's jurisdictional statement is taken out of context in an attempt to give it a meaning contrary to that which, in context, is readily apparent. As was pointed out in appellant's jurisdictional statement (p. 9), the finding of the Commission referred to deals only with the issue as to discrimination against Chicago processors. It does not deal with the discrimination against Chicago grain dealers. The major contention made by appellant is that Chicago grain dealers, who purchase and sell whole corn, cannot buy corn from elevators on the Kankakee Belt in competition with the Kankakee processor. This distinction was carefully explained in appellant's jurisdictional statement (pp. 8-9).[3]

The Commission also argues (Mot., p. 17):

> But where, as here, little or no corn moves on the 72.5 cent rail rate over the Belt Line, the Board of Trade is hardly in any position to claim that the Chicago grain dealer is unduly prejudiced.

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[3] The Solicitor General apparently understands this distinction. See memorandum for the United States (pp. 7-8).

That is exactly the point of which appellant complains. The Chicago grain merchants purchase and store corn without regard to where it may ultimately be sold and shipped. That is a basic function of grain merchandisers. But these grain dealers, who desire to buy rail corn from stations on the Kankakee Belt, must bid for such corn on the basis of the 72.5-cent rate, whereas the Kankakee processor can bid for the corn on the basis of the 54.5-cent rate.[4] That little, if any, corn has moved via Chicago since the 54.5-cent rate became effective is evidence of the injury which resulted from the violation of section 3(1) of the Act of which appellant complains.[5]

Respectfully submitted,

HAROLD E. SPENCER
RICHARD M. FREEMAN
One North LaSalle Street
Chicago 2, Illinois
Counsel for Board of Trade of the City of Chicago, Appellant

BELNAP, SPENCER, HARDY & FREEMAN
One North LaSalle Street
Chicago 2, Illinois
Of Counsel

Dated: May 31, 1963

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[4] The argument of the Commission that Chicago grain dealers previously had an advantage over Kankakee shippers not only is not pertinent to the issues in the case, but also is incorrect. The proportional rate from Chicago to the East, applicable on ex-barge as well as ex-rail corn (*Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567 (1947)), applied via Kankakee with full milling-in-transit privileges.

[5] As pointed out in appellant's jurisdictional statement (p. 8, footnote 5), the Commission noted that the NYC intended to remove this discrimination against Chicago grain dealers by removing the milling-in-transit limitation. This was never done.

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Nos. 746 and 747

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

A. L. MECHLING BARGE LINES INC., ET AL.,
Appellants,

vs.

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Appellees.

BOARD OF TRADE OF THE CITY OF CHICAGO,
Appellant,

vs.

UNITED STATES OF AMERICA, INTERSTATE
COMMERCE COMMISSION, THE NEW YORK
CENTRAL RAILROAD COMPANY, ET AL.,
Appellees.

On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

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REPLY TO INTERSTATE COMMERCE COMMISSION'S MOTION TO AFFIRM

EDWARD B. HAYES,
WILBUR S. LEGG,
Attorneys for Appellants.

LORD, BISSELL & BROOK,
135 South LaSalle Street,
Chicago 3, Illinois,
Telephone: 346-7475,
Of Counsel.

Dated: June 1, 1963.

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October Term, 1962

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On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

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REPLY TO INTERSTATE COMMERCE COMMISSION'S MOTION TO AFFIRM

The United States by the Department of Justice has filed a Memorandum in this proceeding, setting forth a number of questions presented by the appeal deserving

plenary consideration by this Court,[1] and, on pages 16 and 17, pointing out deficiencies in findings of the Commission order which by themselves would require setting the order aside.

Having been unable to convince its statutory legal representative that a motion to affirm should be filed in this proceeding, the Interstate Commerce Commission, uninvited and untimely, has filed a motion to affirm.[2]

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[1] We quote:

"This Memorandum is submitted in response to the Court's request that the United States comment upon the Jurisdictional Statements filed by the appellants. For the reasons indicated below, we believe that the questions presented by the appeals warrant plenary consideration." * * * (Our emphasis.) Memorandum For The United States (hereinafter "U.S. Mem.") p. 1.

[2] Contrary to the statement in footnote 1 on page 2 of the Commission's motion, the Clerk's letter of April 15 was addressed only to the Solicitor General and included no request to the Commission.

Similar liberty with the facts is taken in the first full paragraph on page 2 of the Commission's motion, where the Commission implies that appellants' action in court against the temporary order improperly entered without findings or hearing in this proceeding by the Commission (which was dismissed "for want of jurisdiction"—but compare Mechling v. United States, 368 U.S. 324 (1961)) was in some way a substitute for the subsequent full hearing in this proceeding that appellants had sought and been promised by the Commission.

Similarly in footnote 5 (p. 4) the Commission says that after the 6¢ rate went into effect farmers received much more for their corn, citing a discussion in the Commission's report of a completely hypothetical exhibit which did not purport to reflect any actual experience, and which purported to show the possibility of an increase of 8.75¢ per bushel in the rail bids. The Commission's special counsel here undertakes to stake a claim to have increased farmer income 8.5¢ a bushel, in contrast to the Commission's equally groundless claim that the river bids still were higher than the increased rail bids! Even if the New York Central had reduced the rail rate to nothing, however, and General Foods has passed on the entire reduction in higher bids to farmers, that would not justify the New York Central's charge of a non-compensatory rate.

Much of the Interstate Commerce Commission's motion has already been answered by the Solicitor General's Memorandum and by the jurisdictional statements and replies heretofore filed. A few points, however, deserve further attention:

(1) Neither the Solicitor General nor the Interstate Commerce Commission refers to the protest before the Commission and in the court below against the separately published inbound rate to Kankakee on the ground that it does not comply with the requirements of Section 1 (5) of the Interstate Commerce Act (49 U.S.C. § 1 (5)). The Commission ignored the point in its order on the ground that the inbound rate had no independent existence, thereby contradicting prior decisions that each separately published rate must by itself meet the requirements of the Act. (*Atchison, Topeka & Santa Fe Ry. Co.* v. *U. S.*, 279 U. S. 768, 776 (1929); *City of Sheboygan* v. *C. & N. W. Ry.*, 215 I.C.C. 65, 70 (1936); *Phoenix Utility Company* v. *Southern Ry.*, 173 I.C.C. 500, 501-2 (1931); *Basing Rates on Paving Brick from Jacksonville to Florida Points*, 100 I.C.C. 390 (1925); *Cairo Board of Trade* v. *C.C.C. & St. L. Ry. Co.*, 46 I.C.C. 343 (1917).) The court below refused to consider this point on the ground that it was not pertinent in a Section 4 proceeding, treating the question basically the same as the question whether the Commissioner was bound to consider violations of Sections 3 (1) and 3 (4) by the rate promulgated in deciding whether or not to grant relief from the prohibition of the 4th Section. This point, too, merits at least plenary consideration by this Court. We think it merits summary vacation of the order, and especially when considered with the language of Section 4 itself.

(2) The Commission insists again that the requirement of a compensatory rate in Section 4's proviso limiting the Commission's approval of departure rates is applicable

only to the overall rate rather than only to the competitive rate "to or from the more distant point." It bases its contention on the proposition that Section 4 is intended to prevent carriers from engaging in discriminatory practices giving long-haul shippers rate advantages over competing short-haul intermediate shippers (I.C.C., p. 22). This purpose was undoubtedly a principal reason for the original enactment of Section 4 and its amendments through 1910. This purpose was served, however, by the changes in Section 4 made by the Mann-Elkins Act of 1910.[3]

The changes in the Interstate Commerce Act made in the Transportation Act of 1920,[4] of which the language in question was a part, were largely made for the protection of competing carriers, and principally competing water carries. The Commission was barred from granting the railroads relief from the prohibitions of the fourth section for *any* non-compensatory charge to or from the more distant point. Potential water competition could not constitute a "special case" justifying grant of relief. In Section 15 the Commission was for the first time empowered to fix minimum rates, a power intended to protect competing water carriers from the pressure of below-cost rate competition by the railroads, as was made clear in the committee reports.

The House Committee Report on the bill said:

> "With this power the Commission could prevent a rail carrier from reducing a rate out of proportion to the cost of service by establishing a minimum below which such carrier could not fix its rate. It would also prevent a rail carrier from destroying water competition between competitive points by prohibiting such carrier from so reducing its rates as to destroy its

[3] 36 Stat. 544, 547.
[4] 41 Stat. 474, 480, 484.

water competitor. Circumstances have been cited where the rail carrier destroyed its water competitor by such a reduction of rates as to make it impossible for the water carrier to survive. When once competition was thus driven off, the rail rates would be restored and would rise to even higher levels."

House Report No. 456, 66th Cong. 1st Sess. p. 19.

Stating the purpose of the 1920 amendments on the floor of the House, the Chairman of the Committee, Congressman Esch, pointed out the common purpose of the new minimum rate rule and the amendments of Section 4 by the same act:

"We give [the Commission] the right of fixing the minimum rate in order that it may meet some of the problems arising out of the long-and-short haul clause as contained in the fourth section. We give it the right of fixing a minimum rate in order that it may protect a water carrier against the destructive competition of a rail carrier. You know the story—you can read it upon every mile of every inland waterway of the United States—how the water carrier started, and then the rail carrier paralleled the river bank and made a rate so low that the water carrier had to abandon its line and its route, and after such abandonment the rail carrier raised the rate and the public was not better off and was, in fact, worse off than before."

58 Cong. Rec. 8317.

Nothing in *Proportional Rates to Gulf Ports for Export*, 44 I.C.C. 543 (1917) cited by the Commission on page 23, indicates that the Commission was then *approving* separately published non-compensatory competitive rail rates, either proportional or local, even though it lacked power to forbid them, or that Congress intended in enacting the Transportation Act of 1920 that such rates should be approved.

There is *no* reason to believe that Congress intended anything other than what it plainly said for the first time by the Transportation Act of 1920, *viz.*, that "the Commission shall not permit the establishment of *any* charge to or from the more distant point that is not reasonably compensatory for the service performed." There is every reason to believe that Congress intended exactly what it said, and that non-compensatory rates from the more distant or competitive point, such as the 6¢ rate here involved, are not to be permitted by the Commission.

Since the "minimum rate rule" was introduced by the Transportation Act of 1920, it is held that any railroads proposing to publish new rates, as these railroads were, must show them to be reasonably compensatory in order to meet the requirement *of Section 1 (5)* that the rates shall be "reasonable";[5] and the Commission holds that this applies severally, to each factor of a multiple factor through rate.[6] Otherwise a deliberately non-compensatory charge, separately published as a competitive factor, is easily subsidized by another, non-competitive factor of the whole through rate, and thereby the stated Congressional intention of the authors of the 1920 amendments to protect the water carriers from cut-rate rail competition would easily be defeated.

Among other things these appellants protested against the grant of the authorization applied for as a violation of Section 1 (5) under this accepted interpretation, and the Commission refused to pass on the question as not being germane to the railroads' request for authorization, a view that disregarded the Commission's settled doctrine that it

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[5] Chicago & Eastern Illinois R. Co. v. United States, 107 F. Supp. 118, 123 (S.D., Ind., 1952), aff'm'd, 344 U.S. 917.

[6] City of Sheboygan v. Chicago & North Western Ry. Co., 215 I.C.C. 65, 70 (1936).

will not exercise its power to authorize any new rate departing from Section 4 that does not appear to be lawful under the Act, without regard to which particular section or provision may condemn it.

Moreover, the above-quoted statement by the Chairman of the House Committee, expressly relating the minimum rate rule to Section 4, and the statement of Senator Townsend respecting the new language of Section 4 (M.J.S. pp. 14-15) make it plain that the minimum rate rule of these amendments, enforced as part of Section 1 (5), and the 4th Section, as amended by the same Act to add the language we rely on (which forbids *any* non-compensatory rail charge from the more distant point) were addressed to the same mischief. This mischief was not over-charges against shippers, but the harm done to water carriers and eventually to the country when railroads employ that oldest of all monopoly devices, the making of selective, below-cost charges where they have water competition, subsidized by charges and revenue on non-competitive business that the railroads will continue to have in any event.

It is impossible to read the statements of Congressman Esch, *supra,* and Senator Townsend without realizing the purpose of these 1920 amendments to protect water carriers against such selective rate-cutting by railroads. Very obviously that purpose is defeated if the railroads can subsidize their competitive, below-cost, inbound charges with their non-competitive, outbound revenue *and the new language of the 1920 amendment of Section 4 is apt to prevent that.* It would be difficult to reject the plain and literal effect of that new language as an unintended accident.

Again this point at least deserves plenary consideration if it is not, as we think, sufficiently clear to warrant summary vacation of the Commission's order.

(3) In its motion the Commission has some difficulty in straddling two horses while discussing discrimination against the City of Chicago. On the one hand it half-heartedly urges that there is no such discrimination and that it so found (I.C.C. pp. 15-17). On the other hand it argues at somewhat greater length that the Commission need not consider this point (I.C.C. pp. 17-21).

The "findings" cited by the Commission are sketchy and give no indication that it was trying to decide whether the rate was in fact usable via Chicago, *i. e.*, in trade on the Chicago Board of Trade.[1] Rather these sentences were afterthoughts expressed following the Commission's dismissal of the Board of Trade's position in this clause: "these issues do not directly deal with the fourth-section principles here involved, but are properly matters which may be raised in investigation or complaint proceedings." (M.J.S., App. C, p. 451)

The Commission's discussion of the necessity for considerating violations of Section 3 by rates in issue in Section 4 proceedings adds nothing to that already before the court in the previously filed documents in this proceeding. The Justice Department's Memorandum recognizes the "strong argument" based on the Commission's duty to enforce all provisions of the Act "that sound administrative practice requires the Commission to consider whether Section 3 has been violated so that a proposed rate which violates the policy of the statute may be stricken down at the earliest opportunity." (U.S.Mem. p. 13)

The Justice Department's Memorandum also recognizes the entrapment of appellants by the Commission's sudden

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[1] The District Court, of course, ignored these "findings". Cf. M.J.S. App. A, p. 4a.

departure from its policy enunciated in repeated prior announcements and the consequent issue of unfair administrative procedure as a substantial issue.

Similarly the violation of Section 3(4) is urged by the Commission to be extraneous to a Section 4 proceeding (I.C.C. pp. 20-21). But the Justice Department includes the question as one deserving of plenary consideration (U.S.Mem. p. 12).

(4) Finally the Commission has urged (Commission Motion, pp. 23-24) that its findings show an increase in the New York Central's revenues, citing the *Transcontinental Cases of 1922*, 74 I.C.C. 48. The Justice Department has aptly shown deficiencies in these findings (U.S. Mem. pp. 15-17) even as to the New York Central alone. The findings further omit altogether consideration of the effect upon the revenues of other railroads (as a group or individually) which were parties to the application (cf. the *Transcontinental Cases of 1922*, 74 I.C.C. 48, 71, 77-81) or the necessity for continuing the discrimination against Chicago, in order to make the Commission's deficient argument. (Cf. Mechling Reply to Motions to Affirm, pp. 6-7.)

Again the omission to make adequate findings on an essential point is sufficient to require summarily setting aside the Commission order. (Cases cited, M.J.S. p. 18)

CONCLUSION.

From the foregoing it is apparent that the questions raised by these appeals at least deserve plenary consideration by this Court, and would justify summary vacation of the Commission's order.

Respectfully submitted,

EDWARD B. HAYES,
WILBUR S. LEGG,
Attorneys for Appellants.

LORD, BISSELL & BROOK,
135 South LaSalle Street,
Chicago 3, Illinois,
Telephone: 346-7475,
Of Counsel.

Dated: June 1, 1963.

CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding, by mailing a copy thereof properly addressed with postage prepaid by first-class mail to each such party.

DATED at Chicago, Illinois the ..... day of June, 1963.

.....

EDWARD B. HAYES

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

NO. 58

A. L. MECHLING BARGE LINES INC., a corporation, IRA BOOKWALTER, CULLOM COOPERATIVE GRAIN COMPANY, CHARLES TREASURE, GRISWOLD GRAIN COMPANY, and MAZON FARMERS ELEVATOR,

Plaintiffs-Appellants,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Defendants-Appellees.

NO. 59

BOARD OF TRADE OF THE CITY OF CHICAGO,

Intervenor-Appellant,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Defendants-Appellees.

BRIEF OF PLAINTIFFS-APPELLANTS.

EDWARD B. HAYES,
WILBUR S. LEGG,
Attorneys for Plaintiffs-Appellants.

Of Counsel:
LORD, BISSELL & BROOK,
135 South La Salle Street,
Chicago 3, Illinois,
Telephone: 346 - 7475.

Date Due: December 14, 1963.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

NO. 58

A. L. MECHLING BARGE LINES INC., a corporation, IRA BOOKWALTER, CULLOM COOPERATIVE GRAIN COMPANY, CHARLES TREASURE, GRISWOLD GRAIN COMPANY, and MAZON FARMERS ELEVATOR,

Plaintiffs-Appellants,

vs.

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Defendants-Appellees.

NO. 59

BOARD OF TRADE OF THE CITY OF CHICAGO,

Intervenor-Appellant,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Defendants-Appellees.

BRIEF OF PLAINTIFFS-APPELLANTS.

The appeal in Cause No. 58 was filed on behalf of A. L. Mechling Barge Lines Inc., a common carrier by water certified by the Interstate Commerce Commission (hereinafter referred to as "Commission"), and by five operators of country grain elevators located in north

central Illinois near the Illinois River and the Kankakee Belt branch of the New York Central Railroad. These parties were the original plaintiffs in the case below and will be referred to as "plaintiffs-appellants" to distinguish them from the Board of Trade of the City of Chicago, appellant in Cause No. 59, which intervened as a plaintiff in the case below and will be referred to herein as the "intervenor-appellant" or "Board of Trade" when singular reference may be necessary.

This Court by order dated June 17, 1963, noted probable jurisdiction of, and consolidated, Nos. 58 and 59.

OPINION BELOW.

The opinion of the three-judge United States District Court for the Northern District of Illinois, Eastern Division, is reported at 209 F. Supp. 744, and appears at R.[1] 74-80. The report of the Commission dated June 8, 1960 appears at 310 I.C.C. 437, and in the record at R. 9-29. The proposed report of the Commission's examiner issued in this proceeding on March 16, 1959, appears at R. 32-52.

JURISDICTION.

This action was brought under 28 U.S.C. §§1336, 1398, 2284 and 2321-2325, inclusive, and 5 U.S.C. §1009, to enjoin and set aside an order of the Commission which relieved certain railroads (over the protests of numerous parties including the plaintiffs-appellants and intervenor-appellant) from the long-and-short haul prohibition of

[1] Reference herein to the printed record prepared by the Clerk is by the initial "R" followed by the page numbers. Reference to exhibits introduced before the Commission, but not printed in the record, is by exhibit number as assigned by the hearing examiner and marked as the exhibit.

Section 4 of the Interstate Commerce Act (49 U.S.C. §4(1)). The judgment of the District Court dismissing the complaint was entered on September 18, 1962. Plaintiffs-appellants filed their Notice of Appeal on November 16, 1962.

The jurisdiction of this Court is confirmed by 28 U.S.C. §§1253 and 2101(b).

Decisions sustaining the jurisdiction of this Court to review the judgment on direct appeal in this case include:

Interstate Commerce Commission v. *Mechling*, 330 U. S. 567 (1947);
Dixie Carriers v. *United States*, 351 U. S. 56 (1956);

STATUTES INVOLVED

The following statutes are involved:

The National Transportation Policy, 49 U.S.C. Note preceding Section 1;
Section 1(5) of the Interstate Commerce Act, 49 U.S.C. §1(5);
Section 3(1) and (4) of the Interstate Commerce Act, 49 U.S.C. §3(1) and (4);
Section 4(1) of the Interstate Commerce Act, 49 U.S.C. §4(1);
Section 12(1) of the Interstate Commerce Act, 49 U.S.C. §12(1);
Section 13(1) of the Interstate Commerce Act, 49 U.S.C. §13(1);

The foregoing statutes are set forth in the Appendix.

QUESTIONS PRESENTED.

The questions presented by this appeal are as follows:

1. In a proceeding under Section 4 of the Interstate Commerce Act, was it error for the Commission to disregard evidence that a separately published inbound factor of two-factor rail rates is too low to cover the publishing railroads' out-of-pocket costs for such transportation services, when that noncompensatory inbound factor was published from the more distant point and only the transportation covered by that noncompensatory inbound factor was subject to the competition claimed as a justification for the fourth section departure for which the Commission granted authorization?

2. Is Section 4 of the Interstate Commerce Act applied in accordance with the mandate of the National Transportation Policy when a reduced rail rate departing from Section 4 is authorized by the Commission, even though the rate will divert traffic from regulated water carriers and no showing is made that it will increase the net revenues of the railroads proposing such departure?

3. In considering whether a combination two-factor rail rate on corn (to be milled in transit) was compensatory within the meaning of Section 4 of the Interstate Commerce Act, was the Commission in error in considering the revenue from both factors of the rate while at the same time refusing to consider evidence that the applicant railroads would receive the revenue from the noncompetitive reshipping rate factor whether corn was brought to the reshipping point by water or by rail, where the inbound rail rate factor would not be sufficient to cover out-of-pocket costs of the applicants on the inbound rail haul?

4. In a proceeding under Section 4 of the Interstate Commerce Act instituted after duly filed protests alleged violations of the National Transportation Policy and of other sections of the Act, was it error for the Commission to authorize a rate violating Section 4 without considering duly presented evidence, introduced without objection, that such rate would violate other sections of the Act and the mandate of the National Transportation Policy, and excluding other evidence to like effect?

5. In a proceeding under Section 4 of the Interstate Commerce Act was the conclusion of the Commission that the applicant rail carriers had shown a special case authorizing the establishment of the rate in question based on requisite findings supported by evidence substantial enough to warrant disregard of the examiner's contrary findings?

STATEMENT OF THE CASE.

Plaintiff-appellant Mechling is a common carrier certificated under Part III of the Interstate Commerce Act, and operating barges for the transportation of grain on the Illinois River to Chicago (R. 2, 72).

The other five plaintiffs-appellants are operators of country elevators at locations near the Kankakee Belt Line of the New York Central Railroad west of Kankakee, Illinois and the Illinois River. The Chicago Board of Trade maintains the principal price-registering market for corn in the United States, with corn arriving in Chicago by barge, rail or lake vessel for reshipment to, among other places, destinations east of Chicago (Ex. 43, 44, 45).

The Kankakee Belt Line of the New York Central Railroad Company (NYC) extends from South Bend,

Indiana through Kankakee, Illinois and westward to Zearing, Illinois (R. 295). West of Kankakee it lies at gradually diminishing distances south of the Illinois River until the track crosses the river at Moronts (R. 199, Ex. 2), with trucking distances to river ports from such Kankakee Belt stations varying from 4 to 36 miles (R. 295, Ex. 2). It was constructed to bypass the Chicago Gateway (R. 329-330) and carries substantial amounts of traffic interchanged with other railroads at various points on the line (R. 330). Only an insignificant amount of traffic in manufactured or miscellaneous articles originates or terminates west of Kankakee (R. 295).

The area around the Illinois River and the Kankakee Belt produces a substantial surplus of corn (R. 297), except that the area from Moronts to Zearing is not suitable for farming and no corn is produced for shipment (R. 370).

On behalf of various connecting railroads between the Kankakee Belt and destinations to the east, the Traffic Executives Association-Eastern Railroads applied on June 27, 1957, to the Commission for authority to depart from the long-short haul rate prohibition of Section 4 with respect to combination rates on corn products moving to eastern destinations when milled from corn originating at Kankakee Belt stations between Kankakee and Moronts (not including Kankakee) (R. 138-139). The rates combined were a proportional rate of 5½¢ per hundredweight on the corn from origin to Kankakee and the reshipping rate from Kankakee to destination on the products milled from the corn (R. 296). The combination rates were lower than the local rates on corn and corn products from Kankakee and intermediate origins in Indiana to the same destinations over the

same lines (R. 147). The local rates from the Kankakee Belt stations to Kankakee would have ranged from 16¢ to 25¢ per cwt. if the 5½¢ rate were not applicable (Ex. 62, pp. 1-2).

The justification alleged by the applicants for the relief was that the filed barge rates on corn to Chicago averaged about 4.625¢[18] per cwt. from Illinois River ports (R. 299, 154) and that the 5½¢ rate to Kankakee was necessary to compete with the barge transportation to Chicago, the transportation to the east being at the same reshipping rate by the applicant railroads whether reshipment was from Kankakee or Chicago (R. 299-301, Ex. 9, 10).

The plaintiffs and Board of Trade, as well as many others, duly filed with the Commission protests against granting the requested relief (R. 96-137). In these protests they urged that the applicants had not met their burden of showing (1) that the separately-published 5½¢ rate was reasonable in compliance with Section 1 of the Interstate Commerce Act (R. 236-237, 241); (2) that the 5½¢ rate was compensatory or that the amount of corn carried eastward by the railroads from Chicago and Kankakee would be increased sufficiently over the amounts then carried to compensate for the out-of-pocket deficits incurred on the haul to Kankakee, as required by Section 4 (R. 237, 241); or (3) that the large reduction in rate was no lower than necessary to meet water competition alleged as the reason for the reduction, as required by

[18] New tariffs were filed by the barge lines during the proceeding under which the average rates were increased to approximately 4.825¢ per cwt. (R. 299, 301). All Mechling's transportation of corn to Chicago is performed at rates filed in its tariffs (R. 618). Mechling hauls most of the corn brought to Chicago by barge (Ex. 19), and no other water carrier representative testified or took part in this proceeding.

Section 4 and the National Transportation Policy (R. 189, 237-239, 241). In addition they urged that establishment of the reduced proportional rate into Kankakee would be discriminatory against other towns similarly situated and particularly against the City of Chicago which had natural geographical advantages entirely lacking to Kankakee, and that this discrimination violated Section 3 of the Act (R. 180, 241). Furthermore the protests urged that the rates violated the National Transportation Policy in depriving the barge carriers of their inherent low cost advantage (R. 238); and also Section 3(4) of the Act if the rail carriers from Chicago allowed a division out of the reshipping rate to the rail carrier from Kankakee to Chicago on corn or corn products routed through Chicago from Kankakee to the east, since the charge for the haul from Chicago to the east on this corn would then be less than the charge from Chicago to the east on corn brought to Chicago by barge (R. 237).

A. The Noncompensatory 5½¢ Rate.

The evidence showed that the out-of-pocket cost to the NYC in bringing the corn from Belt stations to Kankakee would average 8.56¢ per cwt., assuming a 55-ton load per car and an average haul of 38.3 miles (R. 600-601) and using the unit cost allocation method developed by the Commission for use in earlier rate cases (R. 594). The fully distributed cost was 13.12¢ per cwt. Upon making other assumptions as to car loadings (the tariff minimum of 50 tons) and average distance of haul (46.4 miles, the arithmetical average of the distances of the Belt stations from Kankakee), the costs were 9.63¢ and 14.33¢, respectively (Ex. 32). The examiner found that the 5½¢ rate was lower than the out-of-pocket cost of the transportation from Belt sta-

tions to Kankakee (R. 48-49, 50, 51). The Commission found the out-of-pocket costs on the haul into Kankakee to be as recited above, but its findings on the compensatory nature of the rates related only to the combined rates (R. 25).

Applicants offered no evidence to show the effect of the 5½¢ rate on total shipments to the east from Kankakee and Chicago. The NYC's witness appeared to assume that the corn originating at the Belt stations at 5½¢ rate would only displace ex-barge corn in the eastern market (R. 315-318), and Witness Chartrand testified that the only economical use of barge billing at Chicago was for shipment via the applicant railroads to the east (R. 821-822). Witness Tascik testified, "My concern is with the New York Central. I don't know what traffic any other railroad might have lost; my one concern was to get traffic for the New York Central" (R. 318). Witness Geekie, located at Paris, Illinois, testified that after the 5½¢ became effective he bought less corn from the west in the territory served by the NYC's lines to St. Louis and to Cairo (R. 518). The Commission made no finding on whether the 5½¢ rate had increased the total rail movement to the east from Chicago and Kankakee.

The applicants relied on comparisons of the combined rates to Atlantic Coast corn export rates from Belt stations and bulk corn export rates from ports on Lake Erie to various Atlantic Coast ports (R. 306, Ex. 17). They further compared the 5½¢ rate requiring transit to a local intrastate rate in Minnesota of 6¢ per cwt. for a distance of 59 miles (Ex. 18), on which no transit was allowed (R. 363). Witness Tascik specifically acknowledged that "any comparison of the five and a half cent rate with some other rate, a local rate, is not comparing like with like" (R. 387).

Witness Tascik's principal basis for urging that the rate was compensatory, however, was that by hauling the corn from Belt stations into Kankakee, the NYC avoided having to haul the corn from Chicago to Kankakee as part of the routing to the east allowed on the reshipping rate from Chicago, thereby realizing the added income from the 5½¢ rate and avoiding the NYC's circuitous haul from Chicago to Kankakee as well as switching charges in Chicago (R. 304-305, 318, 320-321). To effect this saving Witness Tascik intended the corn to go to Kankakee and then to the east without going through Chicago, since movement through Chicago and east would entail not only the haul to Kankakee from the Belt station but also the haul from Kankakee to Chicago with no additional income to the applicants as a group other than the 5½¢ rate (R. 320-321, 339-340). Thus Witness Tascik's justification depended entirely upon his success in preventing corn originating at Belt stations from moving through Chicago.

The Commission found that the NYC realized the saving in switching absorptions and the 5½¢ additional revenue, but did not note that these savings and added revenues could result only to the extent that the corn could be prevented from going through Chicago (R. 24-25).

The examiner found that a substantial part of the switching cost at Chicago was paid to railroads in which the NYC had a proprietary interest (R. 47; see Ex. 14 and R. 382), but the Commission was silent on the point. Both found that the Illinois Central Railroad Company, also one of the applicants, had a more direct line to Chicago from Kankakee than the NYC (R. 46, 23-24, 326, 337).

B. Discrimination Against Chicago, Its Processors and Merchants.

As noted above Witness Tascik, the NYC freight sales manager, sought insofar as possible to exclude Chicago from the routing of grain originating at the Belt stations and carried at the 5½¢ rate. At the hearing the NYC counsel obviously thought that the rates had been constructed so as to exclude use by the wet corn processors in Chicago and appeared surprised that Chicago processors could move corn gluten feed and meal on the 5½¢ rate (R. 768-769, 790-791). In fact, the design to exclude Chicago use of the rate was so well executed that in the first six months of 1957 while the reduced rate was in effect on the Belt, only about 20 cars out of the 1,905 shipped under the reduced rate were routed through Chicago (Ex. 13, R. 304, 321-322). The free corn going to Chicago from Belt towns declined in ten months of 1957 to 46 cars from 273 in the same period of 1956 (R. 803, Ex. 49).

The examiner made no findings on the charges of discrimination against Chicago and its processors. He stated that, because of his conclusion that the 5½¢ rate should not be authorized, they need not be considered in the proceeding (R. 49) and recommended that applicants consider them in any future proposal (R. 52). The Commission dismissed them as not dealing directly "with the fourth-section principles here involved," observing erroneously as an afterthought that Chicago had the same stature as all other corn processing points in official territory (R. 27). In so doing it ignored the NYC's attempt to make the 5½¢ rate usable only by dry corn processors and not by Chicago's wet corn processors.

C. Discrimination Against Connecting Barge Carriers At Chicago.

Witness Tascik testified that if corn from the Belt were carried to Chicago from Kankakee by the NYC and then hauled east from Chicago via another railroad with milling in transit, the 5½¢ rate would apply to the haul to Kankakee, and the Kankakee reshipping rate (equal to the Chicago reshipping rate) to the remainder of the haul (R. 339). From the reshipping rate of 49.5¢ per cwt. on products milled from the corn (using New York City as an example), the NYC received a division of 13¢ per cwt. for its haul from Kankakee to Chicago (R. 340), and the rail carrier from Chicago to New York City received only 36.5¢. Yet on the same transportation of products milled from ex-barge corn from Chicago to New York City, the rail carrier would charge 49.5¢ per cwt. Attempts to examine further into this apparent discrimination against connecting barge carriers at Chicago met with objections which were sustained by the examiner (R. 342-344). Exceptions to this ruling have been urged at each stage of the proceeding, but no change has been made in it; and the discrimination against connecting common carriers by water was ignored by the Commission.

D. Inherent Low Cost Advantage of the Barge Lines.

The NYC's fully-distributed cost of hauling corn from Belt stations to Kankakee averaged 13.12¢ to 14.33¢ per cwt., as shown above. Mechling's average fully distributed cost of hauling corn to Chicago from six river ports was 87.93¢ per net ton, or about 4.4¢ per cwt. (Ex. 35, R. 632). The Commission found this approximate 10¢ per cwt. low cost advantage of Mechling to exist, but held that it was not entitled to any protection "where, as in this instance, the railroad's efforts to secure traffic

do not amount to a destructive competitive practice" (R. 26).

E. Destructively Low Level of the Rate.

Although the plaintiffs did not deny that some rate reduction from the Belt stations was in order, they and other protestants urged that the 5½¢ rate was much more of a reduction than was required to meet water competition and would in time eliminate water competition from the area. The rates suggested by various protestants in the proceeding before the Commission varied from 14.5¢ to 15.5¢ per cwt. (R. 51-52).

Witnesses from three of the principal grain dealers operating river elevators at ports near the Belt testified that the water shipper necessarily must incur expenses peculiar to their operation in addition to the cost of the transportation itself in order to take advantage of water transportation, and that these additional (or "accessorial" as they are now called in Commission opinions) charges must be taken into account in determining the level to which a rail rate can be reduced without threatening the destruction of the water competition alleged as justification for reducing the rail rates. These accessorial charges in this proceeding were (1) trucking from a country elevator to the river elevator; (2) transfer from the river elevator to the barge; (3) stevedoring or trimming the barge at the unloading point in Chicago; (4) Chicago elevation and transfer to rail; and (5) an outbound inspection charge if it were not included in the Chicago elevation charge. The three witnesses testified that these charges would total from 13.3¢ to 13.55¢ per cwt., of which trucking to the river elevator accounted for 5.4¢ (R. 728-729, Ex. 39, R. 747, 755-756).

Later testimony developed that in some instances trucks hauled corn directly from the farm to river elevator and that the trucking charges would be to a certain extent offset by the haul from the farm to a Belt elevator. Even in the case of direct hauls to elevators, however, the haul to the river elevator was on the average much longer because the river elevator by reason of its much larger size drew corn from a radius of up to 25 miles and even 40 miles at times (R. 761, 767), whereas the operators of the smaller Belt elevators testified that they sought corn from only a five or six mile radius (R. 448, 490). Ordinarily trucking to the river was more costly than trucking to the Belt elevator (R. 474). In its order the Commission characterized this higher cost of the longer average haul to the river elevator as "elusive" "logic." (R. 20). It measured trucking costs only from a point exactly midway between Belt and river elevator (R. 20), rather than taking into account the realities of the larger supply area required for the large operations of river elevators shipping 500 tons in one barge as compared to the small operations of railroad elevators shipping 50 tons in one rail car (R. 755).

The Belt elevator's charge for transferring the corn from truck to rail car would not offset the river elevator's transfer charge because the river elevator operators paid a markup to country elevator operators from whom they bought the grain, and this markup was about the same as, or only slightly less than, the markup of the Belt operator transferring into a rail car (R. 743, 772, 824). The large river elevator operators found it necessary to buy through country elevator operators to get the necessary volume of corn (R. 736, 746, 772). Witness Graves, testifying in support of applicants, acknowledged that the river elevator operators had to pay a markup to the coun-

try elevators operators, but allowed only 1¢ per bushel for it in his Exhibit 25.

The Board of Trade studied bids for corn by the elevators at the five principal river ports and in rail cars at five Belt elevators for an eight-month period during which the reduced Belt rate was in effect[1] (Ex. 54). This study showed that on the average the rail bid was about 2¢ per bushel more than the river elevator bid (R. 808-809). The Commission concluded that the study was "defective in that . . . the Belt bids during the comparison period . . . applied to corn at different levels in the transportation chain" (R. 22) from the river elevator bids, because the Belt bids were f.o.b. rail car after elevation while the river bids were f.o.b. trucks at the river prior to elevation into barges (R. 20). The Commission thereby ignored the testimony that the country elevator's markup was about the same whether the operator elevated the corn into the rail car or trucked it to the river elevator. It allowed nothing for the country elevator's markup.

This same conclusion was drawn in a comparison of the rail bid at Missal on the Belt and the nearest river elevator, the Commission concluding that "an adjustment to eliminate the cost of elevation (averaging 2.5¢ per bushel) would place it [the rail bid at Missal] one cent below the river bid at comparable stages in the transportation chain" (R. 17). Yet the witness who testified to this price comparison specifically stated that the rail elevator would get the corn rather than the river elevator (R. 655-656). It was agreed that a price advantage of

[1] The reduced Belt rate went into effect on December 15, 1956 (R. 300), but the applicants did not apply to the Commission for the prerequisite fourth section relief until June 28, 1957.

as little as one-half cent per bushel would attract the corn (R. 759).

The Commission found that the 1956 corn crop in the area was somewhat heavier than the 1955 crop, thus increasing the amount of corn movement in 1957 (R. 14)[3]. It also found that of ten river ports used by the NYC witness in Exhibit 19 to compare barge movements from December 15, 1956 to August 30, 1957 when the reduced rate was in effect with those of December 15, 1955 to August 30, 1956 when the rate was not in effect, Lockport and Joliet were not affected by the reduced rate to the same extent as other ports (by reason of their greater distance from the Belt) and that from Hennepin, Henry and Lacon the predominant movement was south in the earlier period and to Chicago in the later period[4] (R. 14). It further noted that Glidden's river elevators (located at Seneca and Lockport (R. 745)) were opened in the fall of 1956 (R. 14-15) and so contributed nothing to any barge movement in the 1956 period. The Commission further found that from the

[3] Witness Cunningham testified the corn crop was 86,000,000 bushels greater in 1956 than in 1955 (R. 727). The total amount of corn shipped to Chicago from all sources increased from 92,037,000 bushels in 1956 to 137,577,000 bushels in 1957, and rail traffic in corn to Chicago increased from 68,702,000 bushels to 99,396,000 bushels, an increase of 44.7%. Barge receipts increased only about 30.5% (R. 797). River elevator receipts from south of the river uniformly declined sharply during early 1957 (R. 14), but receipts from north of the river increased because of the larger crop (R. 738). The rail movement on the Kankakee Belt increased from 464 carloads in 1956 to 2681 carloads in 1957 (R. 13-14). Of the 1957 amount only about 20%, largely Commodity Credit Corn not subject to the 5½¢ rate, went through or to Chicago (R. 321).

[4] Mechling moved only 24,596 tons of grain from these ports to Chicago in the earlier period and 75,522 tons in the later period (R. 635).

five ports of Morris, Seneca, Ottawa, La Salle and Spring Valley, (which were the only ones listed by the applicants as competitive in their application (R. 154)). Mechling's barge movement to Chicago was lower by 22,928 tons[*] during the competition period than during the corresponding period a year earlier (R. 14). This finding is at variance with Witness Mechling's testimony that the reduction was in fact 27,575 tons (Ex. 33) and Witness Tascik's showing of a decline of 31,724 tons (Ex. 19, p. 2) in the December 15-to-late-August periods they used for comparison.

Nevertheless the Commission drew its conclusion only from a comparison of barge movements to Chicago from all ten ports during the two periods. From this comparison involving so many extraneous factors, the Commission concluded "it is apparent that while corn grown adjacent to the Belt was attracted to the rails, that grown adjacent to the river remained with the barges and that the rates proposed were not lower than necessary to meet barge competition" (R. 28). The Commission took no account of those influences other than the rate reduction which it had earlier found to exist, and which made the bare comparison of the ten port figures invalid for the purpose of determining the extent to which the reduced rail rate had cut into water transportation.

The Commission also ignored uncontradicted testimony that the reduced Belt rate was not widely known in the early part of 1957 and that use of the rate was increasing sharply at the time of the hearings in early 1958. At least one Belt elevator had then begun advertising its rate advantage (R. 727, 697, 702, 708-9).

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[*] 22,928 tons would equal 818,857 bushels, 27,575 tons would be about 986,600 bushels, and 31,724 tons would be about 1,133,000 bushels.

The Commission further refused to consider the disruption of the equality of competitive opportunity for all elevators in the area (which the grain rate structure in Illinois was designed to protect) by the fact that the 5½¢ rate was too low for other railroads to meet although they were willing to reduce rates far enough to meet truck and barge competition (R. 713-714).

The examiner took into account all these factors and found that the 5½¢ rate was lower than necessary to meet the barge competition (R. 50-51).

ARGUMENT.

Introduction—

The Commission has erred in a number of ways which may be grouped under three main subjects: (1) in refusing as a matter of law to consider whether the 5½¢ rate was compensatory when the evidence clearly showed that it did not cover out-of-pocket cost of the haul to Kankakee, even though the evidence indicated that it was the only additional revenue received by applicants for the added work of hauling the corn to Kankakee; (2) in refusing as a matter of law to consider whether the rates violated the National Transportation Policy and Sections 3(1) and 3(4) of the Act, even though these questions had been raised in protests timely filed by appellants, as well as others, and notwithstanding the Commission's obligation under Section 12 of the Act to enforce all sections of the Act; and (3) in concluding, contrary to many of its own findings, to the examiner's findings and conclusions, and to the evidence, that the river elevators were effectively outbidding the Belt elevators for corn in the area from which it further concluded that the 5½¢ rate was no lower than necessary to meet the water competition.

I. THE 5½¢ RATE WAS NON-COMPENSATORY AND UNLAWFUL.

A. As a Separately Published Rate From Water-Competitive Points, The 5½¢ Rate Was Required By Both Sections 4 And 1 Of The Interstate Commerce Act To Be Compensatory.

The 5½¢ rate did not cover the out-of-pocket costs of the transportation service for which it was charged.

The evidence so showed, the examiner so found, and the Commission does not deny the fact. Indeed by finding the out-of-pocket costs for the service to be from 8.56¢ to 9.66¢ per cwt. (R. 25), the Commission tacitly admitted that, considered by itself, the 5½¢ rate fails by a considerable margin to cover out-of-pocket costs.

The Commission concluded as a matter of law, however, that the 5½¢ rate should not be considered by itself, but only the combination rates need be compensatory to meet the requirement of Section 4. The Commission did not discuss Section 1, but presumably it would take the same position with respect to that section. It rested this conclusion on the publication of the rate as a separately-published proportional rate to be used in combination with the reshipping rates from Kankakee to the east, together with the fact that these combinations produce the fourth section violations requiring Commission authorization. In so doing, the Commission ignored both language and purpose of Section 4.

Section 4 provides in pertinent part as follows:

> "It shall be unlawful for any common carrier subject to this chapter . . . to charge or receive any greater compensation in the aggregate for the transportation of . . . like kind of property for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance . . . : Provided, that upon application to the Commission and after investigation, such carrier, in special cases, may be authorized by the Commission to charge less for longer than for shorter distances for the transportation of . . . property, and the Commission may from time to time prescribe the extent to which such designated carriers may be relieved from the operation of the foregoing provisions of this section, but

> in exercising the authority conferred upon it in this proviso, the Commission *shall not* permit the establishment of *any* charge to or from the more distant point that is not reasonably compensatory for the service performed. . . ." (Emphasis ours)

The prohibition of establishment of any non-compensatory charge from the more distant Belt origin stations[6] is complete. The Commission *shall not* permit the establishment of *any* such charge. The charge prohibited is a non-compensatory charge *from* the more distant point, when the variation in distance is at the origin while the destinations are common, as in this case. The reference is solely to the charge from the more distant point, and not to the combination charges, although combination charges were well known in 1920 when this language was incorporated into Section 4 by the Transportation Act of 1920.[7] Indeed, the opening sentence of Section 4 refers to "greater compensation in the aggregate" rather than to a single charge, and it is clear that the first sentence does refer to combination rates as well as to single-factor rates.

This distinction between the language used in the first sentence and in the proviso's condition was intentional. The more distant point is the point at which competition must occur to have the special case required by Section 4. By requiring any charge from the point of competition to be compensatory, Congress sought to prevent publication of competitive rates which were non-compensatory,

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[6] As compared to Kankakee or Indiana origin stations.

[7] 41 Stat. 480. The language did not originally appear in the House Bill, but the Senate proposed similar language and the conference committee settled on this language. H. Rep. No. 650, p. 63, H. R. Rep., Vol. 1, 66th Cong., 2nd Sess. (1919-1920).

even though they might be combined with non-competitive rates which were high enough to supply the deficiency of revenue from the competitive rate.

The precise situation contemplated and forbidden by Congress is presented by this case. The water carriers end their transportation at Chicago. The reshipping rates to the east from Chicago applicable to ex-barge corn there are the same as the reshipping rates from Kankakee applicable to corn brought from the Belt elevators to Kankakee. There is no competition between these rates, both of which are under applicants' control. Both rates are enough higher than the cost of the eastern leg of the haul to subsidize the non-compensatory 5½¢ rate.[9]

In enacting in the Transportation Act of 1920[9] the requirement that *any* charge from the more distant point be compensatory, Congress sought to protect the water carrier from below-cost rate competition of the railroads in any form. In explaining the purpose of this amendment to Section 4, Senator Townsend stated:[10]

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[9] Ironically, all the corn brought by the barge lines to Chicago must be carried east by applicants at this reshipping rate if the corn is to be used to advantage. The barge transportation thus promotes the use of the rate used by the applicants to subsidize the non-compensatory rate by which they seek to take away the barge traffic.

[9] 41 Stat. 474.

[10] The context of the pertinent portion of Senator Townsend's speech is as follows:

> ". . . The system of rate fixing has existed in this country for many, many years. Cities have been builded; the whole country has been established upon these arrangements. Some of them have been wrong. It has been wrong and is so now to fix the longer-haul rate so low that in itself it is not compensatory; that is, it does not yield its proper portion of the expense of

"When the committee had the bill before it I offered an amendment to that provision, which was adopted, which states positively that no rate shall be fixed by the Commission which in itself is not compensatory, that is, which does not yield a proper proportion to the expense of operation of the line." (Emphasis supplied)

Further evidence of this congressional intent to protect water transportation from cutthroat railroad rate competition may be found in other provisions of the Act of 1920. Potential water-competition could not constitute a "special case" justifying grant of relief. In Section 15 the Commission was for the first time empowered to fix minimum rates, a power intended to protect competing water carriers from the pressure of below-cost rate competition by the railroads, as was made clear in the committee reports.

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[10] (Continued)

operation of the railroad system. Then it stands to reason that the shorter routes paying the higher proportioned rate must have an additional burden placed upon them. That is wrong.

"When the committee had the bill before it I offered an amendment to that provision, which was adopted, which states positively that no rate shall be fixed by the Commission which in itself is not compensatory; that is, which does not yield a proper proportion to the expense of the operation of the line. We also provided that purely latent water competition shall not be the basis for the establishment of rates. What I mean by that is this:

"It has been known for a good many years that what are known as Mississippi and Missouri River points have had lower rates than longer [sic] distances on either side, because of the possibility of water competition over the Mississippi and Missouri Rivers. Evidently the object of that was to keep water transportation off both rivers." 59 Cong. Rec., Part I, p. 740, 66th Cong., 2d Sess. (1919).

The House Committee Report on the bill said:

> "With this power the Commission could prevent a rail carrier from reducing a rate out of proportion to the cost of service by establishing a minimum below which such carrier could not fix its rate. It would also prevent a rail carrier from destroying water competition between competitive points by prohibiting such carrier from so reducing its rates as to destroy its water competitor. Circumstances have been cited where the rail carrier destroyed its water competitor by such a reduction of rates as to make it impossible for the water carrier to survive. When once competition was thus driven off, the rail rates would be restored and would rise to even higher levels."
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> H. Rep. No. 456, p. 19, 66th Cong. 1st Sess.

Stating the purpose of the 1920 amendments on the floor of the House, the Chairman of the Committee, Congressman Esch, pointed out the common purpose of the new minimum rate rule and the amendments of Section 4 by the same act:

> "We give [the Commission] the right of fixing the minimum rate in order that it may meet some of the problems arising out of the long-and-short haul clause as contained in the fourth section. We give it the right of fixing a minimum rate in order that it may protect a water carrier against the destructive competition of a rail carrier. You know the story—you can read it upon every mile of every inland waterway of the United States—how the water carrier started, and then the rail carrier paralleled the river bank and made a rate so low that the water carrier had to abandon its line and its route, and after such abandonment the rail carrier raised the rate and the public was no better off and was, in fact, worse off than before."
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> 58 Cong. Rec. 8317, 66th Cong., 1st Sess. (1918).

The commission itself has so construed the effect of the Act of 1920. In the *Transcontinental Cases of 1922*, 74 I.C.C. 48, 70-71 (1922), the Commission, in determining what constitutes a "reasonably compensatory" rate, referred to the purpose of Congress in enacting the amendment, as follows:

> "The criterion of a reasonably compensatory rate suggested by the carriers has been indicated above. It is summarized in the formula 'out-of-pocket-expenses-plus-some-profit.'
>
> "Just as we have rejected the two interpretations of 'reasonably compensatory', suggested by the protestants as too narrow, so we are disposed to reject the single criterion suggested by the carriers in the above formula as insufficient, standing alone. It is probably true that this formula was deemed by us as adequate in disposing of fourth-section applications prior to the amendments of the fourth section in the transportation act, 1920, *Fourth Section Violations in the Southeast*, 30 I.C.C., 153. We do not agree with the carriers that the fourth section has not been changed in substance. The amendment has made mandatory what theretofore rested in our sound discretion *as to compensation for the service performed to the more distant point, as to circuity, and as to potential water competition.* Moreover, in section 500 of the transportation act, 1920, is expressly declared the policy of Congress to foster and preserve in full vigor both rail and water transportation. We think the amendment was the Congress' way of saying that we should follow a less liberal policy in dealing with departures from the long-and-short-haul rule than had been followed in former years. Our administrative power at this time is in some respects narrower than before the amendment. The fourth section, as amended, requires the observance by us of certain administrative rules which we were enforcing prior to the amendment, but which in some measure lay

within our sound discretion to modify or change. We are also required now to accord due observation to section 500 of the transportation act, 1920, which indicates the purpose of Congress—

> to promote, encourage, and develop water transportation, service, and facilities in connection with the commerce of the United States, and to foster and preserve in full vigor both rail and water transportation.

Moreover, the requirements of section 15a may not be defeated or jeopardized by the action of particular rail carriers seeking to augment their own net earnings, irrespective of the effect of rate changes adverse to the carriers of the country generally, or of a large territorial group. *Trunk Line and Ex-Lake Iron Ore Rates*, 69 I.C.C. 589. *It clearly would defeat the intent of Congress to foster transportation by rail and water in full vigor if the rail carriers were permitted, at practically little or no profit to themselves, to operate so as to deprive water carriers of traffic which the water carriers would naturally handle.*" (Emphasis supplied)

The Commission's discussion in this case is a landmark. The concern it expresses for the protection of water transportation from the competition of uneconomic rail charges fairly states the contemporaneous understanding of the congressional purpose in enacting these changes in Section 4. Clearly it is not consonant with this purpose to authorize fourth section rail-rate departures created solely by the promulgation of separately-published *non-compensatory* water-competitive rail charges when the only basis urged for authorizing the fourth section departure is the existence of water competition.

Thus both language and purpose of Section 4 required that the 5½¢ rate be compensatory before the Commis-

sion could lawfully authorize approval of combination rates violating Section 4 of which it was a part. The Commission erred in refusing so to rule.

Not only Section 4 required the 5½¢ rate to be compensatory, however, but Section 1(5) also required each rate to be just and reasonable. To be just and reasonable, a rate must, among other things, at least cover out-of-pocket costs of the service provided. *Chicago & Eastern Illinois R. Co.* v. *United States*, 107 F. Supp. 118, 123 (S.D. Ind., 1952) *aff'm'd*, 344 U.S. 917; *Barge-Rail Coal from Huntington, W. Va., to Chicago District*, 315 I.C.C. 129 (1961), *aff'm'd without reported opinion*, (N.D. Ill., 3/25/63); *aff'm'd on motion, Chicago & Eastern Illinois Railroad Co.* v. *United States*, (U.S. Supreme Ct., No. 275, decided 12/3/63, 32 L.W. 3201, 3202-3204). The Commission had heretofore held that any separately-published rate must comply with all requirements of the act, whether the rate were proportional or otherwise. *City of Sheboygan* v. *Chicago & North Western Ry. Co.*, 215 I.C.C. 65, 70 (1936); *Phoenix Utility Company* v. *Southern Ry. Co.*, 173 I.C.C. 500, 501-2 (1931); *Basing Rates on Paving Brick from Jacksonville to Florida Points*, 100 I.C.C. 390 (1925); *Cairo Board of Trade* v. *C.C.C. & St. L. Ry. Co.*, 46 I.C.C. 343 (1917). This Court has specifically so held with respect to a proportional rate in *Atchison, Topeka & Santa Fe R. Co.* v. *United States*, 279 U.S. 768, 776 (1929). The Commission erred when it failed to do even as much as make a finding on this point.

B. The 5½¢ Rate is Unlawful Because No Showing Was Made That It Would Increase The Net Revenues Of The Applicant Railroads.

In the *Transcontinental Cases of 1922* the Commission sensibly concluded that "It clearly would defeat the intent

of Congress to foster transportation by rail and water in full vigor if the rail carriers were permitted, at practically little or no profit to themselves, to operate so as to deprive water carriers of traffic which the water carriers would naturally handle." 74 I.C.C. at p. 71. Conforming to the rule it had stated, the Commission disapproved reduced rates which would not increase traffic enough to offset (a) loss of revenue on traffic which would be retained in any event; and (b) the out-of-pocket cost of transporting the increase in traffic. The railroads are not to be permitted to play dog in the manager by publishing rates that do not benefit themselves for the sole purpose of injuring competing barge lines. *Transcontinental Westbound Automobile Rates,* 209 I.C.C. 549, 559-561 (1934).

The protestants had duly raised this point in their protests. The Commission should have made findings on this point since it was a condition precedent to granting the requested relief. *North Carolina* v. *United States,* 325 U.S. 507 (1945); *Alabama Great Southern Ry. Co.* v. *United States,* 340 U.S. 216 (1950); *Chicago, Milwaukee, St. Paul & Pacific R. Co.* v. *Illinois,* 355 U.S. 300 (1958); *A. L. Mechling Barge Lines Inc.* v. *United States,* 368 U.S. 324 (1961). It did not do so.

The applicant railroads had the burden of proof that the 5½¢ rate would benefit them by increasing their net revenues. *Transcontinental Westbound Automobile Rates, supra; Counters, Desks, Tables, from Grand Rapids to Indiana and Ohio,* 302 I.C.C. 123 (1957); *Iron Ore from Norfolk To Toledo Dock,* 291 I.C.C. 93 (1953). Witness Tasčik testified that he had not looked into the effect of the 5½¢ rate on the revenues of other applicant railroads, saying, "My concern is with the New York Central. I don't know what traffic any other railroad might have lost; my one concern was to get traffic for the New York

Central." (R. 318). He appeared to concede that the barge traffic being diverted by the 5½¢ rate would have gone east by rail, and the applicants would have had the revenue from the reshipping rate in any event. The only other testimony on this point was that the only economical use of ex-barge corn billing in Chicago was to cancel it against corn shipments east by rail. The sole conclusion possible from this evidence is that the only added revenue realized by applicants for the new transportation from Belt station to Kankakee to have been the 5½¢ rate which did not cover the out-of-pocket costs of providing this service! Applicants could not possibly realize any increase in net revenues under such circumstances.

Witness Tascik contended that the NYC (not the applicants as a group) did realize a saving in avoiding a haul from Chicago to Kankakee over the NYC's circuitous route and in avoiding switching absorptions in Chicago. No cost study had been made, however, to determine whether the single car hauls from Belt stations were in fact more efficient than the multiple car hauls from Chicago shown in Exhibit 14. Another of the applicants had a more direct route to Kankakee, and most of the switching charges in Chicago were paid to the NYC's own subsidiaries. In addition, not all the corn shipped from the Belt was used at Kankakee (Ex. 48, p. 4, R. 802), and routing from Chicago to Kankakee would not have been necessary on much of the remainder.

Most pertinent, moreover, was the fact that this alleged saving would be reversed and become a needless expense if Witness Tascik were compelled to permit free use of the 5½¢ rate by Chicago merchants and shippers, and corn began flowing to Chicago from the Belt in the volume they would use. The very argument was thus premised entirely on Witness Tascik's ability to perpet-

uate the discrimination against Chicago. Still the Commission recited the argument and found no reason to consider in this proceeding the allegations of discrimination against Chicago.

In even mentioning the argument as a reason for disregarding evidence of the cost of the haul from Belt stations to Kankakee, the Commission took a position it contradicted the following year in *Barge-Rail Coal from Huntington, W. Va. to Chicago District*, 315 I.C.C. 129 (1961). In *Barge-Rail Coal* the Commission disapproved joint barge rail coal rates because it found that the rail portion of the rate would be only $2.04 per ton, whereas it found that the out-of-pocket cost of the rail haul would be $2.15 per ton. It ignored as a justification of the $2.04 the fact that the small railroad involved received a division of only $1.66 per ton from the all rail rate for exactly the same service. See Justice Black's dissent in *Chicago and Eastern Illinois Railroad Co.* v. *United States*, 32 L.W. 3203. Yet at Kankakee the large railroad is permitted to charge a rate below out-of-pocket costs on precisely the same kind of justification that was not sufficient for a small railroad cooperating with a barge line. How long can the Commission continue to use different standards for large railroads and small barge lines to the disadvantage of the barge lines!

II. THE COMMISSION ERRED IN FAILING TO CONSIDER VIOLATIONS OF SECTION 3, PARAGRAPHS 1 AND 4, OF THE INTERSTATE COMMERCE ACT AND OF THE NATIONAL TRANSPORTATION POLICY BY THE 5½¢ RATE.

The Commission refused to pass on, or to make adequate findings on, allegations of substantial violations of Section 3, Paragraphs (1) and (4), of the Act,[11] and of

[11] 63 Stat. 485, 49 U.S.C. § 3, Paragraphs (1) and (4).

the National Transportation Policy by the 5½¢ rate. These allegations had been raised in protests which were the basis for the hearing ordered by the Commission. Evidence was introduced with respect to each of them.

The evidence showed that by design the use of the 5½¢ rate had been restricted so as to make it difficult or impossible for Chicago processors to use, that the NYC, despite unfulfilled declarations of intent to remove the milling-in-transit requirement so as to permit Chicago's use of the rate, intended to prevent corn shipped on the rate from going through Chicago, and that the volume of free[12] corn shipped from the Belt towns to Chicago fell from 273 cars for a ten-month period to 46 cars in an equal period after the 5½¢ rate became effective. In its brief the Board of Trade discusses the discriminatory effect of the milling-in-transit requirement to illustrate the four forms of discrimination against Chicago which it had alleged in its protest and on which it had introduced evidence at the hearing.

The evidence further showed if the NYC carried products milled from such corn from Kankakee to Chicago for further shipment by another rail carrier to New York, the NYC got a division of 13¢ per cwt. and the carrier from Chicago to New York received only 36.5¢ per cwt., while that same carrier would charge 49.5¢ per cwt. to transport to New York products milled from corn brought to Chicago by a connecting barge carrier. Further evidence was refused admission, even though enough had been developed to show a strong likelihood that the arrangement violated Section 3(4) of the Act. *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567 (1947); *Dixie Carriers* v. *United States*, 351 U.S. 56 (1956); *Arrow*

[12] "Free" corn was corn not owned by, or pledged to, the Commodity Credit Corporation. Commodity Credit Corporation corn was not shipped at the 5½¢ rate.

Transportation Company v. *United States*, 176 F.Supp. 411 (N.D. Ala., 1959), *aff'd sub nom State Corporation Commission of Kansas* v. *Arrow Transportation Company*, 361 U.S. 353 (1920).

Most astounding was the Commission's casual finding that, although Mechling had fully distributed costs approximately 10¢ per cwt. less than those of the NYC, this advantage was entitled to no protection "where, as in this instance, the railroad's efforts to secure traffic do not amount to a destructive competitive practice." This low cost has heretofore been considered the inherent advantage of water transportation within the meaning of the National Transportation Policy's[13] mandate to the Commission to protect the inherent advantage of competing modes of transportation. *Interstate Commerce Commission* v. *Mechling*, *supra*, at pp. 577, 581. The modification of Section 15a(3) of the Act in the Transportation Act of 1958[14] did not emasculate this provision of the policy. This Court has recently said:

> "Moreover, it is clear that Congress did not consciously or inadvertently defeat this purpose when it included in § 15a (3) a reference to the National Transportation Policy. The principal reason for this reference, as the hearings show, was to emphasize the power of the Commission to prevent the railroads

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[13] 54 Stat. 899, 49 U.S.C. preceding § 1. The policy provides in part:

> "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantage of each; . . . All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

[14] 72 Stat. 572, 49 U.S.C. §15a (3).

> from destroying or impairing the inherent advantages of other modes. And the precise example given to the Senate Committee, which led to the language adopted, was a case in which the railroads, by establishing on a part of their operations a compensatory rate below their fully distributed cost, forced a smaller competing *lower cost* mode to go below its own fully distributed cost and thus perhaps to go out of business." *Interstate Commerce Commission* v. *New York, New Haven & Hartford R. Co.*, 372 U.S. 744, 758 (1963).

In *New Haven* this Court left the determination of means of both measuring and protecting inherent advantages of competing modes of transportation to the Commission for initial resolution. The Commission has made no findings in this proceeding on the means of protecting the barge lines' inherent low cost advantage, apparently on the premise that if it found no destructive competition within the meaning of Section 4, it need not make any findings with respect to the National Transportation Policy. Certainly in the absence of some traffic situation or compelling reason of national defense not present in this case, however, it would appear to have been the congressional intent to preserve to the barge lines the full amount by which the railroads' fully distributed costs exceeded those of the barge lines. The Commission in any event erred in failing to make findings which would show some reason for not according to barge line and shippers this low cost advantage or in the alternative would protect the advantage.

The Commission explicitly stated with respect to the discrimination against Chicago that such matters would not be considered in a fourth section proceeding, but must be made the subject of a separate complaint proceeding. Tacitly the violations of the National Transportation Policy and Section 3(4) seem to have been dealt with in

similar fashion by the Commission. The court below explicitly so dealt with them.

Plaintiffs had raised these points in protests filed with the Commission in reliance on repeated statements of the Commission and this Court that fourth section departure rates should not and would not be authorized if the rates violate other sections of the Act. *Intermountain Rate Cases*, 234 U.S. 476, 486 (1914); *City of Spokane* v. *Northern Pacific Ry. Co.*, 21 I.C.C. 400, 426 (1911); *Transcontinental Cases of 1922, supra*, p. 71; *Bituminous Coal to Buffalo, N. Y.*, 219 I.C.C. 554, 560 (1936); *Pig Iron to Butler, Pa.*, 222 I.C.C. 1, 2 (1937); *Iron & Steel to Minnesota*, 231 I.C.C. 425, 428 (1939); *Lumber from the South and Southwest*, 245 I.C.C. 67, 73-74 (1941); *Coal Briquettes in the South*, 289 I.C.C. 341, 376-377 (1953). In the *Intermountain Rate Cases* this Court specifically pointed out that any application for the Commission's authority to depart from the fourth section must be considered "in view of the preference and discrimination clauses of the second and third sections" of the Act. When these protests were filed, authority was clear and consistent.

Furthermore, good practice by the Commission should encourage the determination insofar as possible of all questions relating to these rates in one proceeding rather than requiring proliferation of proceedings on the same rates before an already over-burdened agency. As was said by Commissioner Porter in *Jamestown Chamber of Commerce* v. *Pennsylvania R.R. Co.*, 139 I.C.C. 491, 492-493 (1928):

> "We believe it desirable and in harmony with the more modern rule adopted by the courts of permitting all parties interested in the same subject matter to become parties to the litigation and so far as possible settle the entire controversy in one proceeding,

to permit the intervention of parties situated as were the interveners in this case."

The Commission discourages relitigation in its Rule 101 (f), which refuses rehearings "submitted by the same party or parties, and upon substantially the same grounds as a former petition." Since the enactment of the Transportation Act of 1940 (54 Stat. 898), this Court holds that "the Commission must take 'cognizance' of the National Transportation Policy and apply the Act 'as a whole'." *American Trucking Association* v. *United States*, 355 U.S. 141, 152 (1957). Application of the Act as a whole will not permit the Commission wilfully to blind itself to infratcions of Sections 1, 2 and 3 of the Act by rates which cannot be charged by the railroad without the Commission's authority—especially when the Commission can grant such authority only after making an investigation of the rates.

The Commission's order would require needless multiplication of proceedings in the interest of a dryly technical formality. Courts have been trying to free themselves of such purposeless formality, and it has no place in proceedings before an agency charged with expeditious administration of an act as a whole.

The order was a departure from prior consistent Commission practice, hitherto correctly regarded by the Commission itself as enjoined upon it by the Act and by the expressions of this Court. The departure was made ex post facto without prior announcement. Such changes in administrative practice or interpretation which affect the rights of parties have been denied retroactive effect from earliest times. *United States* v. *McDaniel*, 32 U.S. (7 Pet.) 1, 13-14 (1833); *United States* v. *Alabama Great Southern R. Co.*, 142 U.S. 615, 621 (1892); *Luckenbach Steamship Company* v. *United States*, 280 U.S. 173, 182

(1930); *West* v. *United States ex rel. Alling*, 30 F. 2d 739, 741 (D.C. Cir. 1929); *Henry Clay and Bock & Co.* v. *United States*, 205 F. 2d 160, 165 (C.C.P.A., 1953).

The authority asserted below was a dictum of a district court (made sixteen months after these plaintiffs filed their protests) in *Seatrain Lines, Inc.* v. *United States*, 168 F. Supp. 819 (S.D. N.Y., 1958). In that case the court nevertheless did strike down the Commission's fourth section order under consideration. The dictum from that opinion would no doubt have been more carefully considered (and would certainly have been submitted to review) if it had in any way affected the result. It rested, expressly, on what is a rather obvious misunderstanding of this Court's decision in *United States* v. *Merchants & Manufacturers Traffic Association*, 242 U.S. 178 (1916). In that case the plaintiffs had not participated in the Commission proceeding. They filed only a petition for reconsideration after the Commission entered its order. Justice Brandeis specifically stated that they were not bound by the order *since they had not participated in the proceeding before the Commission* and that they therefore had an adequate remedy by means of complaint to the Commission under Section 13 of the Act. In pertinent facts, the case could hardly resemble less the plight of these plaintiffs who have participated diligently throughout this proceeding before the Commission at great expense of time and money in reliance upon the Commission's previous pronouncements.

The Commission should not now be allowed to enmesh them in another equally long and costly proceeding for the sole purpose of establishing without prior announcement narrow procedural compartments which can serve only as traps for the unwary. The Commission's duty under Section 12 of the Act (62 Stat. 909, 49 U.S.C. §12)

is to enforce all sections of the Act. (*The Tap Line Cases*, 234 U.S. 1, 29 (1914)). It must do so, particularly where, as here, all parties were advised in advance of the points at issue and participated in a hearing at which evidence on these points was introduced with full opportunity for cross-examination and rebuttal.

III. THE 5½¢ RATE WAS LOWER THAN NECESSARY TO MEET COMPETITION.

Although competition from other modes of transportation has long been recognized as creating a special case sufficient to justify authorization of rates that violate the long-haul-short-haul principle, a corollary of this recognition has been that this competition could justify a reduction in the long-haul rate only to the extent necessary to enable the long-haul carrier to compete with the other mode of transportation. Reductions in the long-haul rates below this level will destroy the competition used to justify the lower long-haul rate, and the promotion of such destructive competition has never been regarded as a special case within the meaning of Section 4's proviso. *Skinner & Eddy Corporation* v. *United States*, 249 U.S. 557, 568 (1919); *Citrus Fruit from Florida to North Atlantic Ports*, 266 I.C.C. 627, 636-638 (1946); *Pacific Coast Fourth Section Applications*, 264 I.C.C. 36, 39 (1945).

The examiner who heard the witnesses testify found from the drastic drop in river elevator receipts of corn from south of the river and the persistently higher bids for corn at the Belt elevators than at the river elevators after the 5½¢ rate went into effect that the 5¼¢ rate was destructively competitive and lower than necessary to meet water competition.

He recognized that total barge shipments of corn to Chicago from the ten river ports of Lockport, Joliet,

Morris, Seneca, Ottawa, LaSalle, Spring Valley, Hennepin, Henry and Lacon had increased in 1957 over 1956, but found that this resulted from a number of factors, some transitory, which offset the loss caused by the 5½¢ rate in 1957. Among these factors were the fact that Lockport and Joliet were too far removed from the Belt to be influenced much by the Belt operation, that new elevators at Lockport and Seneca were operating in the 1957 period and were not operating in the 1956 period, that the area produced 86,000,000 bushels more corn in 1956 for movement in the 1957 period than it had in 1955 for movement in the 1956 period, that diversion of corn from water to Belt would increase as the 5½¢ rate became started better known through advertising just recently ~~stated~~ at the time of the hearing, and that the great preponderance of corn from Henry, Hennepin and Lacon had been shipped to Memphis and New Orleans in 1956, whereas the great preponderance had been shipped to Chicago in 1957.

The Commission, however, relied principally on two of its own conclusions to support its ultimate conclusion that the 5½¢ rate was no lower than necessary to meet competition, even though it, too, found that the corn drawn by the river elevators from south of the river had been reduced by over 1,500,000 bushels in the first eight months of 1957 (R. 14) and recognized the existence of most of the other factors recognized by the examiner as tending greatly to increase river elevator shipments to Chicago in the absence of the 5½¢ rate.

The first of the Commission's conclusions was that the markup of the country elevator on its sales to river elevator operators should be ignored in comparing river elevator and Belt bids for corn, and that the Belt bids should be reduced by the 2½¢ per bushel markup of the Belt operators in order to make the Belt bids comparable

to the river bids. Since the Belt bids had averaged about 2.02¢ per bushel higher than river elevator bids, their reduction by 2.5¢ put them about .5¢ per bushel below the river bids. It was agreed that the elevator bidding .5¢ higher would get the corn.

This conclusion had no support in the testimony. Witness Graves, testifying in support of applicants, testified that the river elevator operators would have to pay 1¢ per bushel as the markup for the country elevator. Every other witness testifying on the subject said that the markup would be about the same as the markup of the Belt elevators on rail shipments. Whether the markup were 1¢ per bushel or higher, the rail bid would be the higher bid which would attract the corn. The witness who testified to one of the comparisons relied on by the Commission in drawing its conclusion testified categorically that the Belt bid was in fact the one drawing corn. The commission's erroneous conclusion that the river bids were higher cannot support the Commission's ultimate conclusion in any way. The proper conclusion would have been that the rail bids were higher and that the rail rate was lower than necessary to meet barge competition. The fact was that bidders for Belt corn did not need to bid their full rate advantage to attract corn from other sources. General Foods, the principal user of the rate, acknowledged that when it had filled its requirements, it reduced its bid or withdrew from the market entirely (R. 550-551).

The second conclusion of the Commission was that "while corn grown adjacent to the Belt was attracted to the rails, that grown adjacent to the river remained with the barges" (R. 28). This conclusion rested principally on a slight increase of corn shipments by barge to Chicago from the ten river ports in the first eight months

of 1957 over the same period of 1956. This increase was by no means as great as the 44% increase in rail shipments of corn to Chicago in 1957, an increase achieved despite the competition of Kankakee for the eastern market which developed from the 5½¢ rate. The Commission's conclusion took no account of the reasons for the increase, even though the Commission had previously found them to exist. In part the Commission's conclusion may have rested also on a selection of the testimony of two country elevators out of eleven who testified. Even this testimony is distorted to imply that the elevator at Marseilles drew corn from an area extending to within six miles from the Belt. The operator testified that his regular trading area extended only five or six miles south of the river, but that he had on occasion gone as far south as 18 miles for a particular customer (R. 686-687), and that since 1956 he had lost some customers and picked up others (without specifying the location of either) (R. 687). Marseilles is about 25 miles north of the nearest Belt station (R. 686). Witness Noder who operated an elevator on the Belt at Granville (R. 489) testified that after the 5½¢ rate became effective the only corn in his area going to the river elevator was grown within a mile of the river elevator and 12 to 14 miles from his elevator (R. 494-495). The Commission ignored this testimony despite the fact that he testified on behalf of applicants.

This discussion of the evidence does not involve the weight which the Commission should have given to particular evidence. In comparing the attractiveness of river and Belt bids for corn, the Commission ignored altogether a markup which all witnesses agreed the country elevator received on its sales to river elevators. In doing so, it drew a conclusion bereft of all support in the evidence. In regarding the comparative movement in 1956 and 1957

of barge movements to Chicago from the ten river ports as indicative that the 5½¢ rate had little effect on the barge movement, the Commission abandoned all pretense of rational application of the laws of cause and effect. The fact that with an increased crop and more river elevators operating, the barge traffic to Chicago was maintained from the north bank of the river with help from areas not much affected by the Belt and at the expense of loss of the barge line's southbound hauls was no guarantee that when these conditions reverted to normal the barge lines could continue to compete.

Many witnesses testified that farmers were slow to learn of the higher prices at the Belt elevators and slow to break established patterns of marketing their corn. These experienced elevator operators were sure that the diversion to the Belt would increase in the future as the 5½¢ rate became more widely known and appeared to gain more permanence with the passage of time. They knew their business and were true prophets.

By drawing conclusions squarely contrary to all the testimony on one point, ignoring and distorting other testimony on other relevant points, and drawing conclusions contradicting its own and the examiner's findings, the Commission did not give that rational consideration to both supporting and opposing evidence in the setting of the whole record which the law requires. *Public Service Commission of Utah* v. *United States*, 356 U.S. 421 (1958); *Universal Camera Corporation* v. *National Labor Relations Board*, 340 U.S. 474, 498 (1951); *Gooding* v. *Willard*, 209 F. 2d 913 (2d. Cir., 1954). This lack of rational consideration is yet another reason for vacating and setting aside the Commission's order.

CONCLUSION.

The Commission's order should be set aside. The Commission has committed an error in law in refusing to recognize that both Sections 1 and 4 of the Act require the 5½¢ rate to be compensatory in and of itself. Further it has erred as a matter of law in refusing to make findings on a number of violations by the 5½¢ rate of the Interstate Commerce Act other than Section 4. This refusal rests on a rule announced without prior warning that only compliance with Section 4 itself need be examined in a Section 4 proceeding, although the other violations are put in issue before hearing. Finally it has drawn conclusions squarely contradictory of all the evidence in point or not logically following from the evidence to hold that the 5½¢ rate is neither destructively competitive nor lower than necessary to meet competition. The result of these errors has been disruption of a long-standing rail rate structure on corn in Northern Illinois, drastic loss of business to plaintiff barge line and elevator operators, and deliberate discrimination against the City of Chicago, its merchants and manufacturers.

The Commission's Fourth Section Order 19346 should be vacated and annulled. Plaintiffs respectfully pray that this Court do so.

Respectfully submitted,

EDWARD B. HAYES,
WILBUR S. LEGG,
Attorneys for Plaintiffs-Appellants.

Of Counsel:
LORD, BISSELL & BROOK,
135 South La Salle Street,
Chicago 3, Illinois,
Telephone: 346 - 7475.

Date Due: December 14, 1963.

APPENDIX.

The National Transportation Policy, 49 U.S.C. Note preceding Section 1.

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act [chapters 1, 8, 12, 13, and 19 of this title], so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions:—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act [chapters 1, 8, 12, 13, and 19 of this title] shall be administered and enforced with a view to carrying out the above declaration of policy."

49 U.S.C. Sec. 1(5); 63 Stat. 485.

§ 1, par. (5). All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection there-

with, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

49 U.S.C. Sec. 3(1); 54 Stat. 902.

§ 3, par. (1). It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: Provided, however, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

49 U.S.C. Sec. 3(4); 54 Stat. 902.

§ 3, par. (4). All carriers subject to the provisions of this chapter shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used

in this paragraph the term "connecting line" means the connecting line of any carrier subject to the provisions of this chapter or any common carrier by water subject to chapter 12 of this title.

49 U.S.C. Sec. 4(1); 71 Stat. 292.

§ 4, par. (1). It shall be unlawful for any common carrier subject to this chapter or chapter 12 of this title to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this chapter or chapter 12 of this title, but this shall not be construed as authorizing any common carrier within the terms of this chapter or chapter 12 of this title to charge or receive as great compensation for a shorter as for a longer distance: Provided, That upon application to the Commission and after investigation, such carrier, in special cases, may be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property, and the Commission may from time to time prescribe the extent to which such designated carriers may be relieved from the operation of the foregoing provisions of this section, but in exercising the authority conferred upon it in this proviso, the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and no such authorization shall be granted on account of merely potential water competition not actually in existence: Provided further,

That any such carrier or carriers operating over a circuitous line or route may, subject only to the standards of lawfulness set forth in other provisions of this chapter or chapter 12 of this title and without further authorization, meet the charges of such carrier or carriers of the same type operating over a more direct line or route, to or from the competitive Points, provided that rates so established over circuitous routes shall not be evidence on the issue of the compensatory character of rates involved in other proceedings: And provided further, That tariffs proposing rates subject to the provision of this paragraph requiring Commission authorization may be filed when application is made to the Commission under the provisions hereof, and in the event such application is approved, the Commission shall permit such tariffs to become effective upon one day's notice.

49 U.S.C. Sec. 12(1); 62 Stat. 909.

§ 12(1). The Commission shall have authority, in order to perform the duties and carry out the objects for which it was created, to inquire into and report on the management of the business of all common carriers subject to the provisions of this chapter, and to inquire into and report on the management of the business of persons controlling, controlled by, or under a common control with, such carriers, to the extent that the business of such persons is related to the management of the business of one or more such carriers, and the Commission shall keep itself informed as to the manner and method in which the same are conducted. The Commission may obtain from such carriers and persons such information as the Commission deems necessary to carry out the provisions of this chapter; and may transmit to Congress from time to time such recommendations (including recom-

mendations as to additional legislation) as the Commission may deem necessary. The Commission is authorized and required to execute and enforce the provisions of this chapter; and, upon the request of the Commission, it shall be the duty of any United States attorney to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions of this chapter and for the punishment of all violations thereof, and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States; and for the purposes of this chapter the Commission shall have power to require, by subpoena, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation.

49 U.S.C. Sec. 13(1); 49 Stat. 543.

§ 13, par. (1). Any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier complaining of anything done or omitted to be done by any common carrier subject to the provisions of this chapter in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make

reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

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Supreme Court of the United States

OCTOBER TERM, 1963

BOARD OF TRADE OF THE CITY OF CHICAGO,
Appellant,

vs.

UNITED STATES, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR APPELLANT

HAROLD E. SPENCER
RICHARD M. FREEMAN
One North LaSalle Street
Chicago 2, Illinois
Counsel for Board of Trade of the City of Chicago, Appellant

BELNAP, SPENCER, HARDY & FREEMAN
One North LaSalle Street
Chicago 2, Illinois
Of Counsel

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 59

BOARD OF TRADE OF THE CITY OF CHICAGO,
Appellant,

vs.

UNITED STATES, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR APPELLANT

OPINIONS BELOW

The opinion of the district court (R. 74-80) is reported at 209 F. Supp. 744. The Commission's opinion (R. 9-29) is reported at 310 I.C.C. 437.

JURISDICTION

The judgment of the three-judge district court (R. 81) was entered September 18, 1962. A timely notice of appeal was filed by appellant (R. 85-87). The Court noted probable jurisdiction on June 17, 1963, and ordered that this

appeal and the appeal in No. 58 be consolidated (374 U.S. 823; R. 837). The Court's jurisdiction on direct appeal is conferred by 28 U.S.C. § 1253 and § 2101(b) and is sustained by *Interstate Commerce Comm.* v. *Mechling*, 330 U.S. 567 (1947); *Dixie Carriers* v. *United States*, 351 U.S. 56 (1956); and *Mechling Barge Lines* v. *United States*, 368 U.S. 324 (1961).

STATUTES INVOLVED

This appeal involves the national transportation policy, preceding 49 U.S.C. § 1, and sections 3(1), 4(1) and 13(1) of the Interstate Commerce Act, 49 U.S.C. §§ 3(1), 4(1), and 13(1). The text of those provisions is set forth in Appendix A, *infra*, pp. 39-41.

QUESTION PRESENTED

May the Interstate Commerce Commission, over the protest of affected shippers and localities, authorize rail carriers to maintain rates which depart from the long-and-short-haul provision of section 4 of the Interstate Commerce Act, without considering and determining whether such fourth-section-departure rates would violate section 3(1) of the Act by causing undue prejudice against such shippers and localities?

STATEMENT OF THE CASE

THE BACKGROUND AND NATURE OF THE CONTROVERSY[1]

This appeal involves the validity of the Interstate Commerce Commission's Fourth Section Order No. 19346 (FSO No. 19346), entered June 8, 1960 (R. 29-30). That order authorized rail carriers to continue, or to establish and maintain, over existing all-rail routes for the transportation of corn products from origins in northern Illinois on the New York Central Railroad's (NYC) Kankakee Belt line between Moronts and Van's Siding, Ill., to points in central, trunkline, and New England territories, herein referred to as the East, combination rates composed of proportional rates to and from Kankakee, Ill., without ob-

[1] The following definitions will be helpful to an understanding of this controversy.

Flat rate—A rate of unrestricted application which is not dependent upon any prior or subsequent transportation.

Proportional rate—A rate which is restricted to apply only on traffic having a prior or subsequent movement, or both. Such rates may also be restricted as to the type of prior or subsequent movement, as, for example, ex-barge proportional rates or ex-rail proportional rates.

Local rate—A rate which applies only over the lines of a single carrier. A local rate can be either a flat or a proportional rate.

Joint rate—A rate which applies over the lines of two or more carriers. A joint rate can be either a flat or a proportional rate.

Single-factor rate—A rate published as one rate from a named origin to a named destination. A single-factor rate can be either a local or a joint rate. If a joint rate, it must be concurred in by all carriers participating in the rate.

Combination rate—A total rate composed of two or more separately established rates. The individual component rates may be rates of any character.

Transit—The privilege of stopping grain or grain products for storage or processing and subsequent reshipment under a rate which applies from origin to destination as if the shipment had not been so stopped. The various transit privileges granted by the carriers are set forth in special transit tariffs which also prescribe the rules and regulations under which such privileges are granted.

serving the long-and-short-haul provision of section 4 of the Interstate Commerce Act (R. 10).[2]

Section 4(1) of the Act (Appendix A, page 40) prohibits the railroads from charging any greater compensation in the aggregate for the transportation of like kind of property for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included in the longer distance. However, "upon application to the Commission and after investigation," carriers may, "in special cases," be authorized to charge less for a longer than for a shorter haul.

Prior to December 15, 1956, the flat rate on grain and grain products from stations on the Kankakee Belt line to both Kankakee and Chicago ranged from 16.5 cents from Van's Siding to 23 cents from Moronts. There were also in effect from stations on the Kankakee Belt line to the East single-factor rates which applied via either Kankakee or Chicago, the rates being the same via either route. These single-factor rates were based on the so-called Chicago combinations. For example, on December 14, 1956, to New York, N.Y., an important representative destination in the East, the single-factor rate on grain from Union Hill, Ill., a representative origin on the Kankakee Belt, via both Chicago and Kankakee, was 68 cents, which was equal to the local rate of 19 cents on grain and grain products to Chicago plus a proportional rate of 49 cents on grain from Chicago to New York, the latter rate being known as the Chicago proportional rate.[3] While the local rates to Chicago and Kankakee applied on both grain and grain products, the Chicago proportionals and the single-factor rates

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[2] The location of the Kankakee Belt line is shown at page 116 of the record. Its location with respect to the Illinois Waterway is shown at page 115 of the record.

[3] All rates and differences, unless otherwise stated, are in cents per 100 pounds.

on grain products from Illinois to the East were uniformly one-half cent per 100 pounds higher than the rates on whole grain.

Effective December 15, 1956, the NYC established a proportional rate of 5 cents on corn to Kankakee from all stations on the Kankakee Belt line between Van's Siding and Moronts, applicable, however, only on corn milled in transit into certain selected corn products and applicable only on traffic to the East. The milling-in-transit requirement thus confined the low rate to a select list of corn products moving under transit. In order to permit the reduced combinations to apply, the NYC cancelled the single-factor rates on corn and corn products from stations on the Kankakee Belt line to the East.[4] This also had the effect of changing the form of the rates on whole corn from single-factor rates to combination rates but without changing the level of the rates.

Using the rates from Union Hill to New York as illustrative, the situation was as follows:

RATES ON CORN AND CORN PRODUCTS FROM UNION HILL, ILL., TO NEW YORK, N. Y.

	December 14, 1956		December 15, 1956	
	Corn (Cents)	Products (Cents)	Corn (Cents)	Products (Cents)
Single-factor rates				
Via Chicago	68	68.5	None	None
Via Kankakee	68	68.5	None	None
Chicago combinations	68	68.5	68	68.5
New Kankakee combinations	—	—	68	54.5

The new Kankakee combinations applied on certain routes through Chicago, but only on a select list of corn

[4] The single-factor rates had to be cancelled to permit the reduced combinations to apply. Under the Commission's tariff rules, whenever a single-factor rate is published over a particular route, that rate applies to the exclusion of any combination of rates, whether the combinations are lower than, higher than, or the same as, the single-factor rates. (49 CFR 141.55(a)).

products, no change being made in the level of the rates on corn. Thus, where the prior rates on corn products were uniformly one-half cent higher than the rates on corn, the new reduced rates on the select list of corn products became much lower than the rates on corn. From Union Hill to New York, for example, as shown in the foregoing table, the rate on corn products became 13.5 cents lower than the rate on corn.

The effect of the milling-in-transit requirement, for all practical purposes, was to prevent Chicago grain merchants and elevator operators from buying whole corn off the Kankakee Belt. When corn moves from a station on the Kankakee Belt to Kankakee or Chicago, the local rate is paid. The inbound charges are deducted from the invoice price and are borne by the country shipper. But, on and after December 15, 1956, the processor at Kankakee could take advantage of the 5-cent proportional rate, knowing that, when the corn was processed and shipped out as corn products, it would secure a credit for the difference between the local rate paid in and the 5-cent proportional. This processor could, therefore, buy corn on the basis of the 5-cent rate. Because the function of a grain merchant or terminal elevator operator is to buy all corn offered without knowing how that corn will eventually be disposed of, Chicago grain dealers and elevator operators, who supply whole corn to many different types of customers at a wide variety of locations, could not buy any substantial quantity of corn off the Kankakee Belt with a sure knowledge that such corn could be sold to an intermediate processor. Thus Chicago grain dealers and elevator operators could not buy on the basis of the 5-cent rate and thus they could not compete with the processor

at Kankakee and a few other processors routing their traffic through Kankakee.[5] Furthermore, there are many users of corn in the East who do not utilize milling-in-transit arrangements and the members of the Board of Trade could not sell corn to these customers on the basis of the 5-cent proportional rate as long as it contained the milling-in-transit requirement.

The establishment of the 5-cent proportional rate resulted in the publication of through combination rates to the East which were lower than the rates for shorter distances from intermediate origins, causing violations of section 4. According to the railroads, it was believed that these fourth-section departures were protected by already outstanding relief (R. 143). Upon being advised by the Commission that this was not the case (R. 143), the railroads filed an application (R. 138-157) under section 4 to continue the existing rates and to establish and maintain additional rates which would also depart from the require-

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[5] The protest of the Board of Trade, and its evidence before the Commission, also raised issues concerning other types of discrimination against Chicago grain interests, such as the limitation of transit privileges to a small select group of commodities produced by the Kankakee processor, the restriction of routing privileges, and the failure of applicants to publish the 5-cent proportional rate to Chicago, the barge-unloading port, which was the competition applicants were professing to meet. (See, *e.g.*, R. 180, 183, 191-194, 799, 813, 817-818)

An understanding of these types of discrimination requires a thorough knowledge of the detailed and complex provisions of the transit tariffs. Since the failure of the Commission to consider the Board of Trade's contentions with respect to these types of discrimination raises the same legal issue as the Commission's failure to consider the Board of Trade's contention with respect to the milling-in-transit requirement, only the latter issue is dealt with in this brief and the other types of discrimination will not be further considered here.

The Board of Trade also alleged that the rates violated section 1 of the Act and the national transportation policy. (R. 188-190, 197)

ments of section 4. This application was filed June 27, 1957. The additional proposed rates were filed to become effective July 30, 1957, but were later voluntarily postponed to become effective August 29, 1957.

PROCEEDINGS BEFORE THE COMMISSION

Notice of the filing of FSA 33955 was given by the publication of a summary of the application in the July 6, 1957, issue of the Federal Register, 22 F.R. 4773. That part of the notice relating to FSA 33955 is set forth in full in Appendix C. There was nothing in the notice that indicated that the Commission's investigation into the matter was to be limited in any respect, or that the protests were to be limited in any way. On the contrary, it was indicated that protests "must be prepared in accordance with rule 40 of the General Rules of Practice (49 CFR 1.40)." There was nothing in rule 40 that restricted in any way the grounds on which such an application could be protested. Rule 40 merely provided that the protest should "set forth specifically the grounds on which it is made and contain a concise statement of the interest of the protestants in the proceeding." Also, the rule governing fourth-section applications provided that "It is the uniform practice of the Commission to hold hearings upon the request of any interested party."[6]

A timely protest to the granting of the fourth-section relief sought was filed by the Board of Trade (R. 177-233).

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[6] Rule XVIII, par. (f) of the Commission's rules of practice as revised to April 1, 1936. This rule apparently had its origin in FSO No. 8900, 88 I.C.C. 765 (1924). When the Commission reissued its rules of practice in 1942, the provisions respecting fourth-section applications were omitted, but the requirements of Rule XVIII continued to be observed by the Commission. *Rules to Govern Filing of Fourth Section Applications,* 310 I.C.C. 275, 276 (1960).

The Board of Trade also filed a petition for suspension of the additional proposed rates (R. 113-122). Several other parties filed similar protests and petitions for suspension.

The Board of Trade's protest against the granting of fourth-section relief (R. 177-233) was prepared in accordance with rule 40 of the Commission's rules of practice. This protest put the Commission and the applicants on notice of the contentions which would be made by the Board of Trade. It set forth the interest of the Board of Trade (R. 177). It clearly pointed out the discrimination caused by the milling-in-transit restriction which limited the rates to apply on corn products and not on whole corn and pointed out that this was a violation of section 3 (R. 179, 181, 186, 189, 197). The Board of Trade prayed that a public hearing be assigned at Chicago "for the purpose of permitting all shippers and interested parties to appear and fully present their case in opposition" to the application (R. 197).

In its reply to the Board of Trade's protest, the NYC admitted that "anomalies" were caused by the milling-in-transit requirement and it indicated that this requirement would be cancelled and that the Board of Trade had been so advised (R. 256).

On August 27, 1957, the Commission's Fourth Section Board entered its FSO No. 18784 (R. 88-89) granting *temporary* fourth-section relief "until the effective date of the further order to be entered after hearing in fourth-section application No. 33955 as amended." The Commission also declined to suspend the proposed additional rates (R. 87, 90). After a period when the rates were under

a temporary restraining order, they all became effective November 28, 1957.[7]

On October 16, 1957, the Commission entered its order (R. 92-93) assigning FSA No. 33955 for hearing on December 4, 1957, which date was later postponed to January 29, 1958 (R. 93-94). None of the hearing notices indicated that the hearing was to be restricted or limited in any way. At the very outset of the hearing, Mr. J. S. Chartrand, who appeared for the Board of Trade, stated (R. 292):

> Now with regard to statement of position, I did not fall in one category wholly nor in the other. It might be stated in this manner, that we are in sympathy with

[7] On August 28, 1957, Mechling and another shipper commenced an action in the United States District Court for the Northern District of Illinois to set aside and enjoin the Commission's temporary FSO No. 18784, and on that date an order temporarily restraining the enforcement and operation of the order was obtained. (*A. L. Mechling Barge Lines Inc.* v. *United States*, Civil Action No. 57 C 1450.) On September 25, 1957, the Board of Trade was permitted to intervene as a party plaintiff in that action. Thereafter the United States and the Commission filed a motion to vacate the temporary restraining order and to dismiss the complaint "for lack of jurisdiction of the subject matter for the reason that the action of the Commission complained of in the complaint is vested exclusively within the power and scope of authority of the Commission and therefore are not orders which are subject to review by this Court." On November 28, 1957, the three-judge district court, without opinion, and without the entry of any findings of fact, granted the motion of the United States and the Commission, dismissed the complaint "for want of jurisdiction," and vacated the temporary restraining order. Although such action was clearly in error (*Baltimore and O. R. Co.* v. *United States*, 264 U.S. 258, 263, 264; *Dixie Carriers* v. *United States*, 143 F. Supp. 844, 853-854; *Mechling Barge Lines* v. *United States*, 368 U.S. 324 (1961)), no appeal was taken from that order, plaintiffs being of the opinion that a decision after hearing on the merits could be obtained from the Commission before such an appeal could be heard and determined by the Supreme Court, a judgment which proved to be grossly erroneous. In other litigation, however, the Department of Justice and the Commission have since conceded that such an order, granting temporary fourth-section relief without supporting findings, is invalid. *Mechling Barge Lines* v. *United States*, 368 U.S. 324 (1961).

> the applicants here, but there are facets of this case which we feel violate other sections of the Act which causes us for those reasons to be opposed to it.

In due course, Mr. Chartrand presented testimony (R. 794-827) and submitted exhibits 42 through 63 in support of the Board of Trade's contentions that the rates for which relief was sought would violate sections 1 and 3 of the Act and the national transportation policy. No objections were made to his testimony or exhibits on the ground that such testimony or exhibits were not material and pertinent to the issues being investigated. The exhibits were received in evidence (R. 727).[8] The Examiner raised no questions concerning the relevance or materiality of the Board of Trade's evidence and did not indicate in any way that he considered the investigation to be confined to certain limited issues.

The principal witness for the applicants conceded (R. 367) that "the same competitive conditions apply to whole corn as apply to corn milled in transit," (R. 367) and, in an attempt to satisfy the Chicago interests, again promised that the NYC would take immediate steps to remove the discrimination against whole corn by removing the milling-in-transit requirement (R. 369). This promise was never carried out.

In its report dated June 8, 1960 (R. 9-29), Division 2 of the Commission concluded that the relief sought had been justified. With respect to the Board of Trade's contentions of discrimination against Chicago grain interests, Division 2 said (R. 26-27):

> The Chicago Board of Trade and others raise certain issues, principally discrimination against whole corn by the milling-in-transit limitation; discrimination

[8] The exhibits are part of the record on appeal but are not printed. By stipulation of the parties, they may be referred to.

against Chicago by the proposed-rate combination applying over Kankakee when prior thereto rates to the East were made over Chicago; undue preference to the processors of corn by the limitations in the application of the proposed rate to commodities shipped by these processors; and unreasonable routes on the proposed rate combination by the restrictive routes which apply over Kankakee in movements to eastern destinations. Although the New York Central intends to remove the milling-in-transit limitation, these issues do not directly deal with the fourth-section principles here involved, but are properly matters which may be raised in investigation or complaint proceedings. However, since the proposed rates are effective over Chicago, that point has the same stature as all other corn processing points in official territory in their application. Moreover, the routes over Kankakee are the same as they were for many years prior to the establishment of the proposed rates, and while limited in their scope as compared to making the inbound rate break on Chicago, there is no indication of undue damage to Chicago.[9]

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[9] The last two sentences quoted have nothing to do with the milling-in-transit requirement. They relate wholly to the restriction of transit privileges and routing. In addition to the discrimination against Chicago caused by the milling-in-transit requirement, the Board of Trade also contended that the limitation of routes and transit privileges via Chicago discriminated against Chicago. For reasons previously stated, that contention is not discussed in this brief. (See footnote 5, page 7). It should be stated, however, that, while the new Kankakee combinations *on corn products only* applied via some routes via Chicago, the routing and transit privileges were more "limited in their scope" than Chicago previously enjoyed. The Board of Trade's contention that the restriction of routes and transit privileges via Chicago also discriminated against Chicago was wholly separate and apart from its major contention that the milling-in-transit requirement discriminated against Chicago by restricting the reduced rates so that they would not apply on whole corn, thereby excluding Chicago grain interests from the source of supply of corn along the Kankakee Belt line and making it a private buying preserve for the Kankakee processor and a few other processors who could route their corn through Kankakee.

Petitions of the Board of Trade and others for reconsideration by the entire Commission of the report and order of Division 2 were denied (R. 31).

THE OPINION OF THE DISTRICT COURT

In spite of an extensive brief and reply brief filed by the Board of Trade, the lower court's treatment of the issues raised by the Board of Trade was very cursory. Its entire discussion of the Board of Trade's contentions is contained in the following portion of its opinion (R. 76-77):

> Plaintiffs claim error in the refusal of the Examiner and the Commission to admit evidence that the proposed rate was discriminatory, unjust and unreasonable, in violation of the Transportation Act; and that the rate failed to preserve the inherent advantage that the National Transportation Policy gives the water carrier. The evidence was excluded for the reason that it was not appropriate in this "Fourth Section" proceeding although it would be pertinent upon a complaint under Section 13(1) or a Commission investigation under Section 15(1).[10]
>
> Plaintiffs argue that the Examiner and Commission were bound not to grant the application under Section 4 if to do so involved violation of the other sections noted. We are referred to the Commission's conclusion that granting the application "would not be disharmonious with the other provisions of the Act," to show what the plaintiffs contend is an inconsistency.

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[10] The statement of the district court (R. 76) that the Board of Trade claims error on the part of the Commission in refusing to admit evidence of discrimination and prejudice against Chicago is incorrect. The evidence was not excluded. What the Board of Trade claims is that the Commission was required to consider, before it could grant relief under section 4, whether the evidence which was admitted showed that the proposed rates would cause undue prejudice to Chicago grain interests in violation of section 3(1).

We may disregard that conclusion as surplusage and we see no error in the exclusion of the evidence of violation of other sections of the Act. The relief granted is permissive only and the evidence offered was not relevant in this Fourth Section proceeding. *United States* v. *Merchants & M. Traffic Ass'n*, 242 U.S. 178 (1916). Due regard was given to the policy and statutory scheme of the Act within the limits afforded by Section 4 and under that Section the Commission is not required to make specific ultimate findings that a rate is lawful and not discriminatory. The water carrier and other plaintiffs have failed to utilize the provisions of sections of the Act which afford the Commission the proper scope for such determination. *United States* v. *Merchants & M. Traffic Ass'n*, 242 U.S. 178, 188 (1916); *Koppers Co.* v. *United States*, 132 F. Supp., 159, 163 (D.C. Pa., 1955); *Florida Citrus Comm'n* v. *United States*, 144 F. Supp. 517, 526 (D.C. Fla., 1956); *Seatrain Lines* v. *United States*, 168 F. Supp. 819, 825 (D.C.N.Y., 1958).

SUMMARY OF ARGUMENT

Section 4 of the original Act to Regulate Commerce of February 4, 1887, 24 Stat. 380 (*infra*, pp. 18-19) prohibited the charging of any greater compensation in the aggregate for the transportation of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but it also provided that the Commission "in special cases, after investigation" might grant relief from this provision. The phrase "in special cases" was not defined in the statute.

In the first year of its existence, the Commission, in considering the meaning of section 4 in relation to the Act as a whole, held that the requirements of other sections of the Act pertaining to reasonableness and dis-

crimination apply just as much to investigations under section 4 as they do in other cases. *Re Louisville & N. R. Co.*, 1 I.C.C. Rep. 31, 1 Int. Com. Rep. 278 (1887).

The Mann-Elkins Act of June 18, 1910, amended section 4 by omitting therefrom the words "under substantially similar circumstances and conditions," thus making the long-and-short-haul clause an absolute prohibition against the charging of more for a shorter haul than for a longer, but it retained the provision that the Commission might "in special cases, after investigation" grant relief from this requirement. 36 Stat. 547-548.

In construing its power to grant relief under section 4, as amended, the Commission held that, in granting such relief, it must consider whether the rates sought to be established would be in conformity with other sections of the Act. *Railroad Commission of Nevada* v. *Southern P. Co.*, 21 I.C.C. 329 (1911); *City of Spokane* v. *Northern P. Ry. Co.*, 21 I.C.C. 400 (1911). The Commission's fourth-section orders granting relief in those cases were upheld in *Intermountain Rate Cases*, 234 U.S. 476, 485-486, wherein this Court, in dealing with the Commission's power to grant such relief, said that such power—

> . . . is made by the statute to depend upon the facts established and the judgment of that body in the exercise of a sound legal discretion as to whether the request should be granted compatibly with a due consideration of the private and public interests concerned and in view of the preference and discrimination clauses of the second and third sections.

From that time to the present case, the Commission consistently held that it would not grant fourth-section relief to establish rates which would violate other sections of the Act, particularly sections 2 and 3. As late as September 28, 1959, Division 2 held that "we cannot grant relief from the long-and-short-haul provision to establish rates that may be in violation of other sections of the act, in

particular sections 2 and 3." *Nepheline Syenite from Ontario, Canada, to the East*, 308 I.C.C. 561, 565.

Less than nine months later, in its report here under consideration, Division 2—two members of which were still the same as in *Nepheline Syenite*—held (R. 26-27) that issues raised by the Board of Trade concerning discrimination against Chicago grain interests in violation of section 3 of the Act, and supported by evidence introduced at the hearing without objection, did "not directly deal with the fourth-section principles here involved, but are properly matters which may be raised in investigation or complaint proceedings," and it declined to pass upon the issues raised by the Board of Trade. The Commission apparently overlooked the fact that, by the very terms of section 4, this was an "investigation" proceeding.[11]

In declining to pass upon such issues under section 3(1) of the Act, Division 2 misconstrued section 4(1), which clearly contemplates that the Commission's power to find that a "special case" exists which would justify relief from section 4 shall not be exercised to permit the establishment of rates which would be unreasonable, unjustly discriminatory, or unduly prejudicial, in violation of sections 1, 2, or 3 of the Act. Such interpretation of section 4 is not only compelled by the wording of the Act itself and by the national transportation policy (Appendix A, *infra*, p. 39), which requires that all sections of the Act shall be administered and enforced with a view to carrying out the policy of the Act against unjust discrimination, undue preferences or advantages or unfair or destructive competitive practices, but that is the only interpretation of section 4 which is consistent with sound and fair administrative practice. It would be wholly unjustified to require

[11] Three months after its decision in the present case, Division 2 again reverted to the Commission's historical position that it would not grant relief for the establishment of rates which would violate other sections of the Act. *Bituminous Fine Coal to La Crosse, Wis.*, 311 I.C.C. 257, 263 (1960).

appellant to file a formal complaint under section 13(1) and to go through another long and expensive proceeding just to raise the same issues of discrimination against Chicago grain interests; and it would be almost unconscionable to permit the railroads to maintain the unlawful rates during the additional five or six years such litigation could easily require.

There are no decisions of this Court which hold that affected shippers and communities cannot raise issues of discrimination in a section 4 investigation but must raise such issues by a separate complaint under section 13(1). *United States* v. *Merchants & M. Traffic Ass'n*, (the *Sacramento* case), 242 U.S. 178 (1916), relied on by appellees and the court below, did not so hold. It simply held that communities which were not parties to the fourth-section proceeding could not attack the orders in court but must seek a hearing by filing a complaint under section 13(1). Whether communities who were parties to the fourth-section investigation, who had already had a hearing and presented evidence of discrimination against them, could attack the order in court, was not involved in the *Sacramento* case.

The only support for the interpretation of section 4 urged by the railroads and adopted by the lower court comes from dicta in the decision of a three-judge district court in *Seatrain Lines* v. *United States*, 168 F. Supp. 819 (S.D. N.Y., 1958), where the court indicated that competing carriers and affected shippers and communities could not raise issues of discrimination under section 3 in an investigation under section 4 but must raise them by a separate complaint under section 13(1). The expressions of the district court on this point in *Seatrain*, which were not necessary to the decision of the case, the Commission's fourth-section order having been set aside on other grounds, were based upon a misconstruction and misinterpretation of the opinion of this Court in the *Sacramento* case.

ARGUMENT

I.

The Commission may not lawfully, over the protest of affected shippers and localities, authorize rail carriers to maintain rates which depart from the long-and-short-haul requirement of section 4 of the Interstate Commerce Act, without considering and determining whether such fourth-section-departure rates would violate section 3(1) of the Act by causing undue prejudice against such shippers and localities.

The question presented by this appeal has never been directly ruled on by this Court. However, in *Intermountain Rate Cases*, 234 U.S. 476, 485-486 (1914), this Court said that the Commission's power to relieve carriers from the long-and-short-haul requirement of section 4 of the Act:

> . . . is made by the statute to depend upon the facts established and the judgment of that body in the exercise of a sound legal discretion as to whether the request should be granted compatibly with a due consideration of the private and public interests concerned and in view of the preference and discrimination clauses of the second and third sections.

In the *Intermountain Rate Cases*, the Court was concerned with the proper interpretation of section 4 as it had been amended by the Act of June 18, 1910, the Mann-Elkins Act, 36 Stat. 547-548. Section 4 of the original Act to Regulate Commerce of February 4, 1887, 24 Stat. 380, had provided:

> That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of

property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this act to charge and receive as great compensation for a shorter as for a longer distance: *Provided, however,* That upon application to the Commission appointed under the provisions of this act, such common carrier may, in special cases, after investigation by the Commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section of this act.

Shortly after its organization, the Commission considered the meaning of section 4 in its opinion in *Re Louisville & N. R. Co., (Re Southern Railway & Steamship Association)*, 1 I.C.C. Rep. 31, 1 Int. Com. Rep. 278 (1887). The Commission held in that case that, although their judgment was subject to the authority of the Commission and the courts to determine whether error had been committed, the carriers were the judge, in the first instance, with regard to the similarity or dissimilarity of circumstances and conditions, and if such circumstances and conditions were dissimilar, no application to the Commission was required.[12] The Commission reviewed the legislative history of section 4 in detail, and, on the construction of the Act as a whole, held that other sections of the Act with respect to reasonableness and discrimination

[12] On this point the Commission changed its position in *Georgia Railroad Commission* v. *Clyde Steamship Co.*, 5 I.C.C. Rep. 324, 4 Int. Com. Rep. 120, but when the subject reached this Court, it was held that the Commission's earlier interpretation was correct. *Interstate Commerce Commission* v. *Alabama Midland Ry. Co.*, 168 U.S. 144 (1897).

apply just as much to investigations under section 4 as they do in other cases.

The Mann-Elkins Act of June 18, 1910, among other things, amended section 4 by omitting therefrom the words "under substantially similar circumstances and conditions." It also provided that no rates or charges lawfully existing at the time of the passage of that Act should be required to be changed prior to the expiration of six months after the passage of the Act nor in any case where application was filed with the Commission in accordance with the provisions of the Act until a determination of such applications was made by the Commission. 36 Stat. 547-548.

For many years prior to 1910 it had been a common practice of the rail carriers to make freight rates from the East to Pacific coast points lower than to intermountain territory because of the competition of the Atlantic-Pacific ocean carriers. Proceeding under section 4, as so amended, the railroads applied to the Commission for relief from section 4 in order to continue in effect the existing rates. The Commission held prolonged hearings on the applications, and, in two reports, granted to the carriers authority to depart from the long-and-short-haul requirement of section 4, but not to the same extent as sought by the carriers. *Railroad Commission of Nevada* v. *Southern P. Co.*, 21 I.C.C. 329 (1911); *City of Spokane* v. *Northern P. Ry. Co.*, 21 I.C.C. 400 (1911). In both of these cases, the Commission gave extensive consideration to its power, under the Act as amended, to relieve carriers from the requirements of section 4 and, in both cases, it held that, in granting such relief, it must consider whether the rates for which authority was sought would be reasonable, non-discriminatory, and non-prejudicial under sections 1, 2, and 3 of the Act.

Dealing with this subject, the Commission said, in the *Nevada* case (21 I.C.C. at 336, 338-339, 341):

> Now, the Congress has pursued, it seems to us, precisely the same theory in regard to the fourth section that it pursued in regard to the first, second, and the third sections. The fourth is but a definite continuation of the policy it was announcing throughout the whole act. Discriminations must stop, viz, undue discriminations. Preferences and advantages must be put an end to—those, to be sure, that are undue and unreasonable.
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> . . . . . .
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> The test which the Commission must now apply to determine whether the carrier may be given the advantage of an exception to the general rule of section four is the same test that it may apply with respect to any other discrimination or inequality. There is incorporated in section four every standard set up by Congress as a guide to this Commission which is to be found in any section of the act. And the leeway or discretion which may properly be exercised by this Commission under any other section may properly be exercised under this section. For instance, it is for us, acting within the limitations of the law, to determine what is a reasonable practice for a common carrier to pursue. This calls for the widest exercise of discretion. And if our judgment is arbitrary, or we transcend those limitations properly binding such a tribunal, our act may be set aside. . . .
>
> The Commission has not been left without a proper test to apply: The test of justness, of reasonableness, of discrimination, of preference and advantage; the test of fair play as between communities. With this construction of the statute, which is historically supported, as well as by those more or less variable measures known as the canons of statutory construction, the statute becomes both practicable and constitutional; we are neither forced to disregard it as a whole nor to eliminate any of its provisions; it does

not become an absolute long-and-short-haul section, because the proviso permitting of exceptions remains; the provisional clause does not relegate the entire section to the limbo of unconstitutionality, because we find that it may be administered in thorough harmony with the whole act, part of which it is; and the tests and standards to be applied are not matters of fancy, but are the express and positive words in the law itself. In short, Congress has undertaken to specify distinctly one practice which it wishes especially to destroy and charges this Commission not to permit it to obtain unless such discrimination, such preference, such practice may be shown not to be a discrimination that is unjust, a preference that is undue, or a practice that is unreasonable, because of peculiar facts and conditions.

. . . . . .

In dealing with this case we shall regard these propositions, therefore, as established:

. . . . . .

(2) That the proviso authorizing this Commission to permit exceptions to the general prohibition of the section is not a grant of arbitrary or absolute power, but its exercise must be limited and conditioned upon the presence in special cases of conditions and circumstances which would make such exceptions legal and proper and in no wise antagonistic to other provisions of the act.

In the *Spokane* case, the Commission said (21 I.C.C. at 412-413, 413-414, 415):

Bearing in mind the authority which the Commission now administers in prescribing a reasonable rate and in declaring and correcting an undue preference, it seems evident that the purpose of Congress was to commit to this body the duty of determining whether if the carrier was permitted to charge a higher rate at the intermediate point that would result in a violation of the provisions of the act. But in so doing the

Commission can not act arbitrarily. It must investigate each case, and if after such investigation it is of the opinion that a departure from the rule of the fourth section would not result in unreasonable rates or undue discrimination it must permit that departure. If, upon the other hand, it is of the contrary opinion, it must refuse the permission. Such is the only possible construction which can be put upon this section in connection with the entire act, and if any doubt as to the real purpose of Congress could exist, it must be effectively put at rest by an examination of the history of the passage of this measure.

. . . . . .

. . . it was provided that in every instance where the carrier desired to deviate from the rule of the section it should apply to the Commission, which should investigate and pass upon the propriety of the lower charge at the more distant point; but Congress did not intend to leave this to the mere whim of the Commission any more than it intended to permit arbitrary action where the question is upon the reasonableness of the rate or the undueness of a preference. This is clearly stated by Mr. Mann, chairman of the committee having the bill in charge in the House, who said in explaining the meaning of this section upon the floor:

> Remember, whatever the Commission does in respect to this matter, it is always bound by the act of Congress that rates shall be just and reasonable and that railroad companies shall not establish unjust and unreasonable rates, so that practically what we do here is to give the Commission power to say what in a particular case shall be a just and reasonable rate, although we declare as a general proposition that it shall be unjust and unreasonable to charge more for a short haul than for a long haul.

To the same import were the remarks of Senator Sutherland, who, when the conference report containing this proviso was before the Senate, said in answer to the objection that in its present form it was void as a delegation of legislative authority:

> When the Interstate Commerce Commission comes to pass upon an application from the railroad companies to be permitted to charge more for the short haul than for the long haul, or less for the long haul than for the short haul, would not the Interstate Commerce Commission itself violate the provisions of section 1 and section 3 that I have read if it did not determine the matter according to the rules laid down in those sections? In other words, must not the Interstate Commerce Commission, in passing upon this question, determine that the rates involved are reasonable, and that as adjusted they do not unjustly or unduly discriminate against any locality? Does not the general language in the law furnish the rule which the Interstate Commerce Commission must adopt in carrying out the provisions of this section?
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> . . . . . .
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> We hold that under the amended section it is the duty of the Commission to investigate each application made by a common carrier for leave to depart from the rule of the section. If we are of the opinion, upon a view of the entire situation, that to grant the application will not result in unjust or discriminatory rates and practices, then it should be granted; otherwise it should be denied; . . .

The Commission's orders in those cases were attacked in the courts and were sustained in *Intermountain Rate Cases*, 234 U.S. 476, *supra*. In its decision, the Court thoroughly considered the effect of the amendment made

to section 4 by the Mann-Elkins Act and said (234 U.S. at 485-486):

> From the failure to insert any word in the amendment tending to exclude the operation of competition as adequate under proper circumstances to justify the awarding of relief from the long and short-haul clause and there being nothing which minimizes or changes the application of the preference and discrimination clauses of the second and third sections, it follows that in substance the amendment intrinsically states no new rule or principle but simply shifts the powers conferred by the section as it originally stood; that is, it takes from the carriers the deposit of public power previously lodged in them and vests it in the Commission as a primary instead of a reviewing function. In other words, the elements of judgment, or so to speak the system of law by which judgment is to be controlled remains unchanged but a different tribunal is created for the enforcement of the existing law. This being true, as we think it plainly is, the situation under the amendment is this: Power in the carrier primarily to meet competitive conditions in any point of view by charging a lesser rate for a longer than for a shorter haul has ceased to exist because to do so, in the absence of some authority, would not only be inimical to the provision of the fourth section but would be in conflict with the preference and discrimination clauses of the second and third sections. But while the public power, so to speak, previously lodged in the carrier is thus withdrawn and reposed in the Commission the right of carriers to seek and obtain under authorized circumstances the sanction of the Commission to charge a lower rate for a longer than for a shorter haul because of competition or for other adequate reasons is expressly preserved and if not is in any event by necessary implication granted. And as a correlative the authority of the Commission to grant on request the right sought is made by the statute to depend upon the facts established and the judgment of that body in the exercise of a sound legal discretion as

> to whether the request should be granted compatibly with a due consideration of the private and public interests concerned and in view of the preference and discrimination clauses of the second and third sections.

From the decision in *Intermountain Rate Cases*, in 1914, to the present time, this Court has never given any indication, contrary to that statement, that the Commission may ignore the matter of possible discrimination in violation of section 3 of the Act when granting fourth-section relief. The Commission itself, throughout all this period and up to the present case, has consistently followed the rule that it would not grant fourth-section relief for rates that would violate other sections of the Act, particularly sections 2 and 3, and has often cited this Court's decision in *Intermountain Rate Cases* as authority for that position. Excerpts from representative decisions of the Commission so holding are set forth in Appendix B, *infra*, pp. 42-47. Typical of the many expressions of the Commission is the following from *Commodity Rates to Pacific Coast Terminals*, 107 I.C.C. 421, 436 (1926):

> But before the relief from the operation of the fourth section which is here sought may be granted we must be satisfied that there would not thereby be created infractions of other provisions of the act, particularly those of section 3 prohibiting undue or unreasonable preference or advantage of or prejudice or disadvantage to persons or localities.

As late as September 28, 1959, Division 2 of the Commission—two members of which were also on Division 2 when it decided the present case—held in *Nepheline Syenite from Ontario, Canada, to the East*, 308 I.C.C. 561, 565, that

> . . . we cannot grant relief from the long-and-short-haul provision to establish rates that may be in violation of other sections of the act, in particular sections 2 and 3. See *Intermountain Rate Cases*, 234 U.S. 476.

Yet, less than nine months later, Division 2 held in the present case (R. 27) that questions of discrimination against Chicago grain interests "do not directly deal with the fourth-section principles here involved." The Division did not even refer to any of its earlier cases where it had specifically held to the contrary; it did not cite any court authority, and it gave no reasons for this change of position. In September, 1960, again without discussion or explanation, Division 2 reverted to the historical position of the Commission that "we may not grant relief to establish rates that may be in violation of other sections of the Act." *Bituminous Fine Coal to La Crosse, Wis.*, 311 I.C.C. 257, 263 (1960).

In holding that the Board of Trade's allegations of discrimination against Chicago did not "directly deal with the fourth-section principles here involved," the Commission did not define what it considered to be "the fourth-section principles here involved." In support of the Commission's order, the railroads argued that all they needed to establish to justify fourth-section relief was that they were confronted by actual water competition and that the rates they proposed for the longer hauls were reasonably compensatory. The lower court evidently agreed with that theory, holding (R. 77) that evidence as to the discriminatory character of the rates "was not relevant in this Fourth Section proceeding," and that the Commission gave due regard "to the policy and statutory scheme of the Act within the limits afforded by Section 4."

From the original enactment of section 4 in 1887, the Commission has been authorized to relieve carriers from the requirements of section 4 "in special cases." While the meaning of that phrase is not defined in the Act, it is quite clear from the decisions of this Court and from the decisions of the Commission itself that no case can con-

stitute a "special case" justifying relief from the requirements of section 4 if the rates for which such relief is sought would violate sections 1, 2, or 3 of the Act.

When the rail carriers argue that all they need to show to constitute a "special case" justifying relief under section 4 is the presence of actual water competition and the fact that their proposed rates are reasonably compensatory, they are relying on language that was not even added to section 4 until 1920 by section 406 of the Transportation Act, 1920, 41 Stat. 480. That act added to section 4 the following provision:

> . . . but in exercising the authority conferred upon it in this proviso the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; . . . and no such authorization shall be granted on account of merely potential water competition not actually in existence: . . .

Quite obviously, the rail carriers, in order to establish a special case justifying relief based on water competition, must show that they are confronted with actual water competition and that their proposed rates are reasonably compensatory, but there is no basis for holding that that is all they need to show.

If there were any doubt about the proper construction of section 4 prior to 1940—and, we submit, there can be no such doubt—certainly there cannot be any doubt since 1940, when Congress enacted its national transportation policy, 54 Stat. 899 (Appendix A, p. 39). That declaration provides that it is the policy of Congress to encourage the establishment and maintenance of reasonable charges for transportation service, "without unjust discrimination, undue preferences or advantages, or unfair or destructive

competitive practices" and provides that "All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy." That declaration does not say that all of the provisions of the Act except section 4 shall be so administered and enforced; it says *all* of the provisions of the Act. When that policy specifically provides that *all* of the provisions of the Act shall be administered and enforced with a view to carrying out the policy of the Act as a whole, there cannot possibly be any legal basis for saying, as did the lower court, that the Commission gave due regard to the policy and statutory scheme of the Act "within the limits" of section 4. Section 4 has no such limitations, either expressed or implied.

The interpretation of section 4 here urged by the Board of Trade is not only compelled by the clear language of the Act, but it is also the only interpretation of section 4 which is consistent with sound and fair administrative practice. The Commission held a lengthy hearing on the carriers' application for fourth-section relief. The hearing lasted for five days. The transcript of testimony before the Commission extended to 852 pages and 65 exhibits were received in evidence. The Board of Trade's witness presented evidence relating to the discrimination against Chicago (R. 794-827) and no question was raised about his right to present such evidence. And, while the carriers argue that all they need to show is the presence of actual water competition, their own witness conceded (R. 367) that "the same competitive conditions apply to whole corn as apply to corn milled in transit." The rail carriers seek to require the Board of Trade to file another complaint and go through another lengthy Commission proceeding in order to compel the rail carriers to accord whole corn equality of treatment with corn products, in

spite of the fact that their witness conceded that "the same competitive conditions apply to whole corn as apply to corn milled in transit," and in spite of the fact that they promised to take immediate steps to remove the milling-in-transit requirement, a promise which the Commission referred to in its report (R. 26-27), but which was never carried out.

Furthermore, to permit the maintenance by the rail carriers of these unlawful rates for another five or six years pending the trial and disposition of another proceeding would be very unfair. The rates involved have now been in effect since December 15, 1956. For eight months they were in effect in violation of section 4 without any outstanding relief. For three months they were under a temporary restraining order, then for two years and seven months they were in effect by virtue of a "temporary" fourth-section order of a kind which both the United States and the Commission have since conceded is invalid. Since June 8, 1960, they have been in effect by virtue of the order under attack in this case. If that order is invalid, as appellant alleges, it should be set aside and enjoined at the earliest moment and the unlawful rates should be required to be withdrawn pending proper consideration by the Commission of appellant's contentions that such rates cause undue prejudice to Chicago grain interests in violation of section 3(1) of the Act.

II.

The cases relied on by the court below do not support its interpretation of section 4 of the Act.

Four cases were relied on by the court below in support of its holding (R. 77) that the Board of Trade's contentions of discrimination against Chicago grain interests were "not relevant in this Fourth Section proceeding," and that the

Commission gave due regard "to the policy and statutory scheme of the Act within the limits afforded by Section 4." Two of those cases are not even remotely pertinent to the issue here presented.[13]

One of the cases relied on by the court below was *United States* v. *Merchants & M. Traffic Ass'n* (the *Sacramento* case), 242 U.S. 178 (1916), which was a sequel of the decision in *Intermountain Rate Cases*, 234 U.S. 476 (1914), *supra*. Prior to 1910, when it had been the common practice of the rail carriers to make freight rates from the East to Pacific coast points lower than to intermountain territory (*supra*, p. 20), many interior cities near the coast had been granted the same transcontinental rates as the ports of San Francisco and Oakland because the competing water carriers customarily absorbed the local rates or charges from the ports to those cities. Among those interior cities were the cities of Sacramento, Stockton, San Jose, and Santa Clara, Calif. Those cities had taken no part in the proceedings prior to the decision in *Intermountain Rate Cases*.

Following the decision in *Intermountain Rate Cases*, some modifications were proposed by the carriers and additional hearings were had in which many shippers (but not the cities of Sacramento, Stockton, San Jose, and Santa Clara) participated. Changes in conditions occurring since

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[13] *Koppers Co.* v. *United States*, 132 F. Supp. 159, 163 (W.D. Pa., 1955); *Florida Citrus Commission* v. *United States*, 144 F. Supp. 517, 526 (N.D. Fla., 1956). Neither of those cases involved the requirements of section 4 of the Act. In both of those cases the court simply declined to set aside a Commission order in a "general revenue increase" case, saying that the remedy of a person aggrieved by such an order was under section 13(1) or section 15(1) of the Act. The situation here is entirely different. The present case is not a "general revenue increase" case. It is a specific "rate" case, in which the Commission has authorized particular rates which result in undue prejudice to some shippers and undue preference of others.

the entry of the original order on July 31, 1911, were considered, among them being that the ocean carriers had discontinued the practice of absorbing the rates from the ports to the interior cities. A new plan for constructing back-haul rates developed by the Commission was embodied in an amended fourth-section order. Following the limitation imposed by that amended order, the railroads' tariff confined the low terminal rates to such ports as San Francisco and Oakland, and the interior cities including Sacramento, Stockton, San Jose and Santa Clara were subjected to rates materially higher than to San Francisco and Oakland, though much lower than the rates to intermountain territory. Representatives of the four cities then applied to the Commission for a "rehearing," and, when their application was denied, they brought suit in the district court to restrain the enforcement of the amended order.

This Court held that the four complaining cities, who were not parties to the Commission investigation, could not attack the Commission's order in court and that, in seeking a "rehearing" in the fourth-section proceeding before the Commission, those cities had mistaken their remedy, and what they should have done was to file a complaint under section 13 of the Act. In so holding, this Court said (242 U.S. at 188):

> For the order is permissive merely. The carrier is the only necessary party to the proceeding under § 4. The Commission represents the public. While it is proper and customary for communities or shippers interested to participate in hearings held, there is no provision for notice to them. They are not bound by the order entered; at least in the absence of such participation. And if the rates made by tariffs filed under the authority granted seem to them unreasonable, or unjustly discriminatory, §§ 13 and 15 afford ample remedy. Respondents contend that, after the amended order was entered and the tariffs filed, they

> did apply to the Commission for relief "but were denied the right of a hearing" and that "their protest and demand were ignored and denied." What they did was to petition for a "rehearing" in the proceedings under the Fourth Section, to which they now say they were not parties, instead of applying for redress under § 13, as they had a legal right to do. They mistook their remedy. To permit communities or shippers to seek redress for such grievances in the courts would invade and often nullify the administrative authority vested in the Commission; . . .

The carriers rely on that language to support their argument that questions of discrimination are not relevant in fourth-section investigations but, we submit, that language is subject to no such interpretation. That decision simply holds that persons who were not parties to a fourth-section investigation, but who applied to the Commission for a "rehearing" which was denied, did not have the right to attack the order in the courts because they had not exhausted their proper administrative remedies by the filing of a complaint under section 13 as they were entitled to do. That decision neither holds nor implies that persons who are parties to a fourth-section investigation cannot attack the order in the courts until they have filed a separate complaint under section 13 and presented the same evidence all over again. Unlike the cities of Sacramento, Stockton, San Jose, and Santa Clara, the Board of Trade is not seeking "redress for [its] grievances in the courts." It is simply asking the Court to require the Commission to properly construe and apply section 4 so that the Board of Trade can obtain redress for its grievances before the Commission in the proceeding which has already been heard.

Seatrain Lines v. *United States*, 168 F. Supp. 819 (S.D. N.Y., 1958), also relied on by the court below (R. 77), was an action brought by a competing water carrier to set

aside and enjoin a permanent fourth-section order of the Commission, entered without a hearing, allowing rail carriers to depart from the long-and-short-haul provision of section 4 of the Act and to charge less for the transportation of articles between eastern points of origin and southwest Gulf ports than was charged to intermediate inland points. The three-judge district court set aside and enjoined the order on the ground that it lacked the necessary supporting findings of fact. One of the contentions made by the plaintiff water carrier, Seatrain, was that the rates for which authority was sought discriminated against it. Although not necessary to the decision in the case, the district court held as follows on that contention (p. 824):

> However, Section 4 does not contemplate that there shall be a determination in a Section 4 proceeding as to whether the rates charged are unduly discriminatory against a competing water carrier. This question must be raised by proceedings under Sections 13 and 15 of the Interstate Commerce Act. In such proceedings a hearing must be held at which all parties affected, carriers, shippers and communities, can be heard and their respective interests appropriately weighed and balanced by the Commission.
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> Thus, in so far as the plaintiff claims discrimination against it resulting from the new authorized rates, it has not exhausted its administrative remedies because it has not petitioned for a hearing under Sections 13 and 15 at which such claims would be determined.

The foregoing dicta of the three-judge district court in the *Seatrain* case are the only expressions of any court of which we have knowledge that even remotely indicate that the Commission, in granting fourth-section relief, need not consider whether the rates for which authority is sought would cause undue prejudice to protesting parties

in violation of section 3 of the Act. The decision of the district court was not appealed. Since Seatrain succeeded in setting aside the order on other grounds, there was no reason for it to appeal. Neither the railroads, the Commission, nor the United States appealed, and the Commission reopened the proceeding for a hearing.

On this point, the *Seatrain* opinion contains no independent discussion or reasoning and the only citation of authority is to the *Sacramento* case. It seems apparent that the district court's erroneous interpretation of the requirements of section 4 in the *Seatrain* case was based upon a misconstruction or misinterpretation of the opinion of this Court in the *Sacramento* case. This is borne out by the following portions of the district court's opinion in *Seatrain* (168 F. Supp. 819, 824, 825):

> Mr. Justice Brandeis' opinion in *United States* v. *Merchants' & Manufacturers' Traffic Ass'n*, 242 U.S. 178, 37 S.Ct. 24, 61 L.Ed. 233, on which defendants heavily rely, merely holds that Fourth Section orders are not reviewable as to their discriminatory effect on particular communities and that communities claiming such discrimination are relegated to appropriate proceedings under Sections 13 and 15. But the case does not hold that Fourth Section orders are not reviewable on the question of whether the procedures required by Section 4 have been followed and whether they are lawful and proper under that section.
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> . . . . . .
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> As Mr. Justice Brandeis pointed out in *United States* v. *Merchants & Manufacturers Traffic Ass'n*, *supra*, Fourth Section approval by the Commission is permissive only. The Commission is called upon to determine only the limited questions of whether this is a "special case" and whether the proposed rates are "reasonably compensatory". All questions as to the effect of the rates upon competing carriers, ship-

pers and affected communities are reserved for determination in proceedings under Sections 13 and 15 where a "hearing" is expressly required.

This Court in the *Sacramento* case did not hold "that Fourth Section orders are not reviewable as to their discriminatory effect on particular communities and that communities claiming such discrimination are relegated to appropriate proceedings under Sections 13 and 15." What this Court held was that communities *which were not parties* to the Commission investigation could not obtain court review of the order. The question of whether communities which were parties to the Commission investigation could obtain such court review was not involved in the case. And, we submit, there is no language in this Court's opinion which indicates that investigations under sections 13 or 15 are more "appropriate" for determining whether rates for which fourth-section relief is sought would unduly discriminate against affected communities than the "investigation" specifically required by section 4.

There is not only no indication in this Court's opinion that the determination of whether a "special case" exists is a "limited" question, but the contrary clearly appears. In referring to that clause, giving the Commission power to grant fourth-section relief "in special cases," this Court said in the *Sacramento* case (242 U.S. at 187):

> The clause in Amended Fourth Section which declares "That upon application to the Interstate Commerce Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances" was designed to guard against the issue, by the Commission, of general orders suspending the long and short haul clause, and to ensure action by it separately in respect to particular carriers and only after consideration of the special circumstances

existing. Whenever such consideration has been given —"the commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of the section."

There is no indication in this Court's opinion that the "consideration" which the Commission must give to "the special circumstances existing" is, in any way, to be a "limited" consideration of only a few of the circumstances. The Commission must consider all the special circumstances existing, including the discrimination against protesting parties. As shown in section I of this brief, the term "special case," as interpreted by the Commission and the courts, has always implied that the rates for which relief is sought would not violate other sections of the Act. Nor could the district court in *Seatrain* properly rely on this Court's opinion in the *Sacramento* case as authority for holding that the Commission, in a fourth-section investigation, need consider only whether the proposed rates are "reasonably compensatory," for, as has been already shown (*supra*, p. 28), that clause was not even added to section 4 until after the *Sacramento* case was decided.

Insofar as the *Seatrain* decision expresses the opinion that questions of discrimination against affected communities and shippers who have protested the rates and submitted evidence in a fourth-section investigation need not be considered in that proceeding, it is plainly wrong. There is no support in the decisions of this Court for any such proposition, and no valid reasons can be given to support the adoption of any such rule.

CONCLUSION

For the reasons herein set forth, the judgment of the court below should be reversed with directions to set aside and permanently enjoin the Commission's Fourth Section Order No. 19346 and to remand the case to the Commission for further proceedings in accordance with the requirements and provisions of the law and the opinion of this Court.

Respectfully submitted,

HAROLD E. SPENCER
RICHARD M. FREEMAN
One North LaSalle Street
Chicago 2, Illinois
Counsel for Board of Trade of the City of Chicago, Appellant

BELNAP, SPENCER, HARDY & FREEMAN
One North LaSalle Street,
Chicago 2, Illinois
Of Counsel

December 14, 1963

APPENDIX A

The national transportation policy, 54 Stat. 899 (49 U. S. C. preceding § 1) and the Interstate Commerce Act, 24 Stat. 379, as amended, (49 U.S.C. § 1 *et seq.*) provide as follows:

NATIONAL TRANSPORTATION POLICY

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

* * * * *

SEC. 3(1) It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or ad-

vantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

* * * * *

SEC. 4(1) It shall be unlawful for any common carrier subject to this part or part III to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this part or part III, but this shall not be construed as authorizing any common carrier within the terms of this part or part III to charge or receive as great compensation for a shorter as for a longer distance: *Provided,* That upon application to the Commission and after investigation, such carrier, in special cases, may be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property, and the Commission may from time to time prescribe the extent to which such designated carriers may be relieved from the operation of the foregoing provisions of this section, but in exercising the authority conferred upon it in this proviso, the Commission shall not permit

the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and no such authorization shall be granted on account of merely potential water competition not actually in existence: . . .

* * * * *

SEC. 13(1). That any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this part, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

APPENDIX B

Representative decisions of the Commission reflecting its historical position that it will not authorize the establishment and maintenance of rates which do not conform to the requirements of section 4 of the Act if such rates would violate other sections of the Act are as follows:

> Now, the Congress has pursued, it seems to us, precisely the same theory in regard to the fourth section that it pursued in regard to the first, second, and the third sections. The fourth is but a definite continuation of the policy it was announcing throughout the whole act. Discriminations must stop, viz, undue discriminations. Preferences and advantages must be put an end to—those, to be sure, that are undue and unreasonable.
>
> . . . . . .
>
> The test which the Commission must now apply to determine whether the carrier may be given the advantage of an exception to the general rule of section four is the same test that it may apply with respect to any other discrimination or inequality. There is incorporated in section four every standard set up by Congress as a guide to this Commission which is to be found in any section of the act. And the leeway or discretion which may properly be exercised by this Commission under any other section may properly be exercised under this section. For instance, it is for us, acting within the limitations of the law, to determine what is a reasonable practice for a common carrier to pursue. This calls for the widest exercise of discretion. And if our judgment is arbitrary, or we transcend those limitations properly binding such a tribunal, our act may be set aside. . . .
>
> The Commission has not been left without a proper test to apply: The test of justness, of reasonableness, of discrimination, of preference and advantage; the test of fair play as between communities. With this construction of the statute, which is historically sup-

ported, as well as by those more or less variable measures known as the canons of statutory construction, the statute becomes both practicable and constitutional; we are neither forced to disregard it as a whole nor to eliminate any of its provisions; it does not become an absolute long-and-short-haul section, because the proviso permitting of exceptions remains; the provisional clause does not relegate the entire section to the limbo of unconstitutionality, because we find that it may be administered in thorough harmony with the whole act, part of which it is; and the tests and standards to be applied are not matters of fancy, but are the express and positive words in the law itself. In short, Congress has undertaken to specify distinctly one practice which it wishes especially to destroy and charges this Commission not to permit it to obtain unless such discrimination, such preference, such practice may be shown not to be a discrimination that is unjust, a preference that is undue, or a practice that is unreasonable, because of peculiar facts and conditions.

* * * * *

In dealing with this case we shall regard these propositions, therefore, as established:

* * * * * *

(2) That the proviso authorizing this Commission to permit exceptions to the general prohibition of the section is not a grant of arbitrary or absolute power, but its exercise must be limited and conditioned upon the presence in special cases of conditions and circumstances which would make such exceptions legal and proper and in no wise antagonistic to other provisions of the act. *Railroad Commission of Nevada* v. *Southern P. Co.*, 21 I.C.C. 329, 336, 338-339, 341 (1911).

* * * * * *

It goes without saying that carriers should not propose rates or rate structures for approval in a fourth-section application which create infractions of other provisions of the interstate commerce act, and

particularly of section 3. *Transcontinental Cases of 1922*, 74 I.C.C. 48, 71 (1922).

* * * * *

But before the relief from the operation of the fourth section which is here sought may be granted we must be satisfied that there would not thereby be created infractions of other provisions of the act, particularly those of section 3 prohibiting undue or unreasonable preference or advantage of or prejudice or disadvantage to persons or localities. *Commodity Rates to Pacific Coast Terminals*, 107 I.C.C. 421, 436.

* * * * *

To paraphrase the language of the Supreme Court, in the exercise of a sound legal discretion we may grant permission to charge higher rates at the intermediate points upon the ground that such rates are part of an established group adjustment, if we are satisfied that this is compatible "with a due consideration of the private and public interests concerned and in view of the preference and discrimination clauses of the second and third section," and, no doubt, of the provisions of the first section also. *Commodity Rates On Lumber and Other Forest Products*, 165 I.C.C. 561, 569 (1930).

* * * * *

It is well settled that sections 3 and 4 should be so construed as to cause them to operate harmoniously. *Differential Routes To Central Territory*, 211 I.C.C. 403, 421 (1935).

* * * * *

It is well settled that we will not authorize fourth-section relief where the proposed rate structure would create infractions of other provisions of the act. Thus, where any doubt appears, the burden is upon applicants to show that the proposed rate structure would not result in any unlawful situations. *Bituminous Coal To Buffalo, N. Y.*, 219 I.C.C. 554, 560.

* * * * *

Water competition has long been recognized as creating a special case in which relief may be granted from the provisions of section 4. *Intermountain Rate Cases*, 234 U.S. 476. However, the relief from that section cannot be granted to establish rates that may be in violation of other sections of the act. *Pig Iron To Butler, Pa.*, 222 I.C.C. 1, 2 (1937).

* * * * *

Our authority to grant relief from the provisions of section 4 is limited to "special cases." A special case which might justify fourth-section departures upon grounds of market or other competitive conditions, contemplates that such departures will not result in violations of other provisions of the act; particularly section 3. On this record, we conclude that applicants have failed to sustain the burden which rests upon them to prove that the proposed rates would not create infractions of provisions of the act other than section 4. In the circumstances, we find that sufficient justification has not been shown to warrant the approval of the relief sought. Accordingly, the application will be denied. An appropriate order will be entered. *Iron and Steel To Minnesota*, 231 I.C.C. 425, 428 (1939).

* * * * *

The record contains uncontradicted evidence submitted on behalf of the Chicago intervener that the reduction of the rates from Janesville to Evanston, and not to points in the Chicago district, would unduly prefer the Evanston dealer and unduly prejudice Chicago dealers in competing for business both in Evanston and in the Chicago district.

We find that sufficient justification for the relief prayed by this application No. 17453 has not been presented, and accordingly it will be denied. *Sand and Gravel to Northfield and Evanston, Ill.*, 234 I.C.C. 65, 68 (1939).

* * * * * *

It is clear that the suspended rates would result in violations of section 3 of the act. In their brief, the western trunk-line respondents suggest that such

situations should be handled in separate proceedings. Ordinarily, adjustments which invite further controversy must be viewed with disfavor.

We find that the proposed rates have not been shown to be just and seasonable, and that they would result in violations of section 3 of the act. An order will be entered requiring their cancellation and discontinuing the proceedings. The fourth-section applications will be denied. *Iron and Steel from Minnequa to Kans., Neb., S. Dak.*, 278 I.C.C. 163, 168-169 (1950).

* * * * *

In the administration of section 4 of the act, the Commission has adopted the view that relief from the provisions thereof should be granted where necessary to enable a carrier to retain or secure traffic which otherwise would move over another route, provided the rates established for that purpose do not conflict with other provisions of the act, and are not contrary to the public interest. *Coal and Coal Briquets in the South*, 289 I.C.C. 341, 376-377 (1953).

* * * * *

When fourth-section relief is granted it should be compatible with the affected interests and with the provisions of the Interstate Commerce Act. *Passenger Fares, Hell Gate Bridge Route, New York, N.Y.*, 296 I.C.C. 147, 153 (1955).

* * * * *

The protestant meets the same competition at Lake Charles that is encountered by the grinders at Houston and Corpus Chirsti. The evidence is convincing that the proposed rate would result in undue prejudice to the protestants and in undue preference of shippers and receivers under the proposed rate.

In view of the conclusion reached with respect to the proposed schedules, a further discussion of the fourth-section application is unnecessary. *Crude Barytes Ore, Mo. to Corpus Christi and Houston*, 299 I.C.C. 505, 508 (1956).

* * * * *

The rail carriers have the right to meet competition in whatever form it may arise, provided that the rates do not contravene any provision of the act, and we may, subject to certain conditions, grant relief from the operation of the long-and-short-haul provision of section 4 of the act with respect to such rates. The first part of section 4(1) of the act is devoted to expressing the general prohibition against charging more for a shorter than for a longer haul over the same line or route, the shorter being included in the longer distance, and also against charging greater compensation as a through rate than the aggregate of intermediate rates. However, as indicated, it is within our power to relieve the carriers from the operation of this general prohibition, upon application by them and investigation of the matter by us, but only in special cases and only after finding that the charge to the more distant point is reasonably compensatory for the service performed.

The first question to be resolved is whether the situation presented falls within the category of a special case. Competition has always been the principal "special case" which we have recognized in granting relief. Although this be true, the existence of competition does not *ipso facto* entitle an applicant to relief. The competition relied upon must always be examined in relation to the existing circumstances, bearing in mind that we cannot grant relief from the long-and-short-haul provision to establish rates that may be in violation of other sections of the act, in particular sections 2 and 3. See *Intermountain Rate Cases*, 234 U. S. 476. *Nepheline Syenite from Ontario, Canada, to the East*, 308 I.C.C. 561, 564-565 (1959).

* * * * *

The competition relied upon must be examined in relation to the existing circumstances, bearing in mind that we may not grant relief to establish rates that may be in violation of other sections of the act. *Bituminous Fine Coal to La Crosse, Wis.*, 311 I.C.C. 257, 263 (1960).

APPENDIX C

NOTICE APPEARING IN THE FEDERAL REGISTER FOR JULY 6, 1957, 22 F.R. 4473

INTERSTATE COMMERCE COMMISSION

FOURTH-SECTION APPLICATIONS FOR RELIEF

July 2, 1957.

Protests to the granting of an application must be prepared in accordance with Rule 40 of the General Rules of Practice (49 CFR 1.40) and filed within 15 days from the date of publication of this notice in the FEDERAL REGISTER.

LONG-AND-SHORT HAUL

* * * * *

FSA No. 33955: *Corn and products—Illinois points to eastern points.* Filed by O. E. Schultz, Agent, for interested rail carriers. Rates on corn, and corn products, carloads from specified points in Illinois to Kankakee, Ill., and from Kankakee to specified points in central territory, western termini of eastern trunk lines in New York, Pennsylvania and West Virginia, and points east thereof in trunk line and New England territories.

Grounds for relief: Truck-barge-truck competition via Chicago, Ill., and circuitous routes.

Tariff: New York Central Railway Company's tariff I.C.C. 1169, supplement No. 126.

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 58

A. L. MECHLING BARGE LINES, INC., ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

No. 59

BOARD OF TRADE OF THE CITY OF CHICAGO, APPELLANT

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE NEW YORK CENTRAL RAILROAD COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the district court (R. 74) is reported at 209 F. Supp. 744. The decision of the Interstate Commerce Commission (Division 2) (R. 9–29) is reported at 310 I.C.C. 437. The proposed

report of the Commission's hearing examiner is set forth at pages 32–52 of the transcript of record.

JURISDICTION

The judgment of the district court was entered on September 18, 1962 (R. 81). Separate notices of appeal were filed by A. L. Mechling Barge Lines, Inc., et al., and the Board of Trade of City of Chicago on November 16, 1962 (R. 82–87). Probable jurisdiction was noted on June 17, 1963 (R. 837). 374 U.S. 823. The jurisdiction of this Court on appeal rests on 28 U.S.C. 1253 and 2101(b).

QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission may grant relief from the long haul-short haul provision of Section 4 of the Interstate Commerce Act without passing on a contention, raised by the pleadings and supported by evidence at a hearing, that a term of the proposed rate violates Section 3(1) of the Act.

2. Whether the evidence in the record supports the Commission's conclusion that the proposed rate did not constitute a destructive competitive practice.

3. Whether the Commission adequately considered a contention that evidence pertaining to alleged violations of Section 3(4) had been erroneously excluded by the hearing examiner.

STATUTE INVOLVED

The provisions of the National Transportation Policy, preceding 49 U.S.C. 1, and Sections 1(5), 3(1), 3(4), 4(1), 13(1) and 15(7), 49 U.S.C. 1(5),

3(1), 3(4), 4(1), 13(1), and 15(7) are set forth in the Appendix, *infra*, pp. 40–44.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court dismissing a complaint seeking to set aside an order of the Interstate Commerce Commission. The Commission's order, entered under Section 4 of the Interstate Commerce Act, permitted the New York Central and its connecting rail carriers to institute a rate structure under which lower rates were charged for certain longer hauls than for shorter hauls on the same route.

1. THE SITUATION PRIOR TO THE PROPOSED RATES

The New York Central Belt Line west of Kankakee, Illinois, roughly parallels the Illinois River, on which Mechling Barge Lines, Inc., operates its barges. The Belt Line is in competition with Illinois River barge lines for the business of transporting corn from northern and central Illinois to intermediate points for reshipment to destinations on the eastern seaboard. Farmers located in northern and central Illinois are in a position to sell their corn either (1) to elevators located along the river for transportation by barge to an east-west railroad or (2) to elevators located along New York Central's Belt Line for transportation by the Belt Line to a connecting east-west railroad. Since the elevators bear the cost of this transportation, the amount they can bid for this corn is significantly affected by rates they must pay (R. 13, 15–16).

At one time, corn from the affected area moved over all-rail routes to eastern destinations. About 24 years ago, the development of commerce on the Illinois River started a diversion of traffic from the all-rail routes to barge-rail routes. Corn or corn products began to move first by barge from river ports to Chicago, and then by rail from Chicago to eastern destinations. As a result of this diversion, corn traffic on the Belt Line almost vanished (R. 13). The little corn the Belt Line continued to carry was principally corn owned by the Commodity Credit Corporation. Such corn is usually shipped by rail for export and is charged a special rail export rate which is less than the domestic rate for corn or corn products (*ibid.*).

Barge lines were successful in capturing so much of the traffic for the following reason: Historically, the rail rates on grain and grain products from the affected territory to eastern destinations were composed of combinations of rail rates to and from Chicago. Later when single-factor rates were established they were made equal to these combinations. Thus, before the proposed rates [1] went into effect the rail rate from origins on the Belt Line to eastern destinations was 72 cents for corn and 72.5 cents for corn products [2] via Chicago (including Chicago via Kankakee) (R. 320), either as a through rate or as a combination of the 23-cent local rate to Chicago and the 49 or 49.5-

[1] Even though the rates now under attack have been in effect for six years (see *infra*, pp. 9–10), we shall refer to them as "proposed rates" for the sake of simplicity.

[2] The rates on corn products were uniformly 0.5 cent higher than those on corn (R. 11).

cent proportional rate[4] to the East. On the other hand, the average barge rate on corn and corn products, in competition with the Belt Line from ten ports along the Illinois River, to Chicago, was 4.625 cents (effective December 1957, this average barge rate was raised to 4.825 cents) (R. 12). Such corn and corn products could then be shipped to the East by rail for 49 or 49.5 cents, just as the corn shipped to Chicago by rail. Therefore, the barge-rail rate for corn from Illinois River points to eastern destinations was substantially cheaper (approximately 19 cents) than the all-rail rate.

2. THE PROPOSED RATES

In order to recapture the traffic which had been lost to competing barge lines, the New York Central and its connecting carriers proposed a rate structure

[4] The following definitions of terms will be helpful to an understanding of the grain rate structure with which this case is concerned.

Ex-barge corn—Corn transported from a point by rail which has been shipped to that point by barge.

Ex-rail corn—Corn transported from a point by rail which has been shipped to that point by rail.

Flat rate—A rate of unrestricted application which is not dependent on prior or subsequent transportation.

Proportional rate—A rate which is restricted to traffic having prior or subsequent transportation and is only a portion of the total transportation charge.

Joint through rate—The total rate from the origin to the final destination published as a single rate covering the entire movement.

Transit—The privilege of stopping grain or grain products at any point for storing, processing, and subsequent shipping.

Division—The share of a joint through rate received by any of the participating carriers.

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featuring a new proportional rate of 5 cents (now 6 cents because of general rate increases) on shipments from origins along the Belt Line to Kankakee or Chicago (R. 11, 320). This proportional 6-cent rate does not apply to shipments from origins on the Belt Line ending at Chicago or Kankakee; it is available only to traffic destined for points in the East, and only to corn milled in transit. Hence the 6-cent rate is available only in conjunction with the existing rate on rail shipments to traffic destinations in the East. The single factor rate for through movements from these origins to the East is inapplicable when the proposed proportional rate is lower (R. 11–12).

The mechanism by which the rate reduction is accomplished is as follows: Shipments originating on the Belt Line are charged the local or flat rate of 23 cents to Kankakee. If the corn products (which have been milled in transit) are shipped east, the inbound charges are adjusted to receive the benefit of the lower proportional rate to Kankakee. Accordingly, a credit of 17 cents is applied to ex-rail corn products which are moved eastward by rail whether on the New York Central or its connecting carriers (R. 13). Thus the 6-cent proportional rate is not reflected as a separate charge but as a credit on movements to eastern destinations of corn products on Belt Line corn which has been milled in transit (R. 25).

The New York Central and its connecting carriers filed the proposed rates to become effective on December 15, 1956, and they were permitted to become effective at that time without protest. The proposed rates

resulted in greater charges for a shorter haul than for a longer haul along the same line, since, by reducing the rates from origins on the Belt Line to the East, the rates for these longer hauls became lower than those applying to the shorter distances from Kankakee and points east, north, and south of Kankakee to the eastern destinations. In other words, under the proposed rate it became less expensive to ship corn products from origins on the Belt Line to the East than from Kankakee and points east, north, and south of Kankakee to the East. For example, the charge for shipping corn products from Moronts, Illinois, to New York City under the proposed rate structure was 54½ cents, *i.e.*, a 5-cent rate to Kankakee, Illinois plus the 49½ cent proportional rate from Kankakee to New York. On the other hand, a shipment originating from Kankakee itself was charged the full flat rate of 66 cents to New York City. Similarly, the rate charged for shipments originating at Hamilton, Indiana, or Butler, Indiana, to New York City was 56 cents, or 1½ cents more than from Moronts, even though these points were at least 200 miles closer to New York (R. 147).

3. COMMISSION PROCEDURES FOR OBTAINING SECTION 4 RELIEF

Section 4 of the Interstate Commerce Act prohibits a carrier from charging rates which are higher for a long haul than for a shorter haul along the same line. In "special cases," however, the Commission is authorized to relieve a carrier from the operation of Section 4.

Under the Commission's Rules and Regulations, carriers seeking such "Section 4 relief" are required to file a detailed application setting forth the facts and circumstances justifying a departure from the long haul-short haul principle. 49 C.F.R. 143.75–143.85. When such an application is filed, the Commission refers it to a staff group of three rate specialists known as the Fourth Section Board, which operates informally. 49 C.F.R. 1.200. Notice of the application is given in the Federal Register, and the Commission's rules of practice now require that notice be given to competing water carriers. 25 Fed. Reg. 6631, July 14, 1960. 49 C.F.R. 143.81(a)(8). Protests must be filed within 15 days. 49 C.F.R. 1.40. Either the applicant or a protestant may request a hearing. The Commission's practice is to order a hearing whenever one is requested by an interested party. It may also—and sometimes does—order a hearing even though no party has requested one, and even though no protests have been filed.

If, at the end of the 15-day period, no protest has been filed, the Fourth Section Board may either refer the case to the Commission with its recommendation, or may decide the case itself. Although the Commission ordinarily does not make any findings in such cases, it does not grant temporary or permanent authority unless it is satisfied that the statutory criteria are met, namely (1) that there is a "special case" based on circumstances other than potential water competition and (2) that the long-haul rates are "reasonably compensatory." In cases where there is neither protest nor hearing—and these constitute the bulk of

the Section 4 proceedings—the Commission ordinarily takes final action on the application within 30 days after it has been filed.

If the matter is set for hearing, however, the Commission may grant temporary authorization pending the hearing and determination of the application for permanent relief. The Commission makes its decision whether to grant temporary relief on the basis of the application, the protest, and any comments by interested parties. Until recently, the Commission generally has not made any findings when granting temporary authority. See *A. L. Mechling Barge Lines, Inc.* v. *United States*, 368 U.S. 324. At the hearing on the question of permanent authority, both the applicant and the protestants have the opportunity to offer the testimony of witnesses, who are sworn and are subject to cross-examination. 49 C.F.R. 1.74.

4. PROCEEDINGS BEFORE THE HEARING EXAMINER AND THE COMMISSION

When the proposed rates were filed, New York Central and its connecting carriers believed that Section 4 relief previously granted by the Commission covered all Section 4 departures caused by the new rates. In fact, however, the new departures had not been previously authorized (R. 12). When this was discovered, the rail carriers filed an appropriate application for Section 4 relief (R. 138).

In response to this application, numerous protests were filed urging that the relief be denied (R. 96, 123, 128, 167, 177, 234, 245, 248). In addition, some protestants filed petitions for suspension of the rates under

Section 15(7) (R. 96, 123, 126, 133, 135). In some instances these papers were entitled "Protests and Petition for Suspension * * *" (R. 96, 123). Protestants not only challenged the validity of the proposed rate structure under Section 4, but also alleged violations of the National Transportation Policy (R. 112, 124, 195, 197, 238, 241, 250) and of Sections 1 and 3 of the Act (R. 112, 131–132, 136, 137, 171, 180, 194, 197, 237, 241). The railroads answered all of these attacks in a single reply to the various protests and petitions for suspension (R. 252).

Thereafter, suspension of the proposed rate revision was denied, and the rail carriers were given temporary relief pending a hearing (R. 87, 88–89). Division 2, acting as an appellate division of the Commission, affirmed the denial of suspension and the grant of temporary relief (R. 90, 92). On August 21, 1957, certain of the appellants brought suit in the United States District Court for the Northern District of Illinois to suspend the Commission's temporary Section 4 order, and they secured a temporary restraining order, but the order was vacated on November 28, 1957, when the action was dismissed for want of jurisdiction. The rates which are the subject of the Commission order now under attack have thus been in effect for six years (R. 10).

The rail carriers' application for Section 4 relief proceeded to hearing before an examiner. At the hearing the protestants renewed their objections to the proposed rates, contending that they violated not only Section 4, but other provisions of the Act as well.

A. ALLEGED VIOLATIONS OF SECTION 3(1)

The Chicago Board of Trade and others introduced evidence in support of their contention that the proposed rates would violate Section 3(1) of the Interstate Commerce Act, which prohibits undue discrimination among shippers and localities (R. 26). They charged that such discrimination resulted because the proposed rate was restricted to corn milled in transit (R. 104–105, 365–369). Therefore, those grain merchants who ship whole corn east cannot take advantage of the proposed 6-cent rate but are required to pay the higher 23-cent flat rate. Corn processors who sell corn products, on the other hand, are able to mill the corn in transit and thereby take advantage of the reduced rate. Because they know that the 6-cent rate is available to them, corn processors are able, in the purchase of corn from points along the Belt Line, to outbid grain dealers who deal in whole corn. The Chicago Board of Trade also alleged that Chicago corn processors are discriminated against by the proposed rate because certain territorial restrictions in the proposed tariff favor Kankakee processors (R. 26, 103–104).

The hearing examiner accepted all of the evidence offered with respect to these contentions, but both he and the Commission declined to rule on whether the proposed rates did violate Section 3(1). The reason given for this was that "[a]lthough the New York Central intends to remove the milling-in-transit limitation,[*] these issues do not directly deal with the fourth-

[*] The milling-in-transit limitation has not as yet been removed, so far as can be ascertained.

section principles here involved, but are properly matters which may be raised in investigation or complaint proceedings" (R. 26–27, 49). The Commission did, however, note that "there is no indication of undue damage to Chicago" (R. 27, 49).

B. ALLEGED VIOLATIONS OF SECTION 3(4)

During the proceeding before the hearing examiner, it was admitted that the New York Central received a 13-cent division of the reshipping rate from Kankakee via Chicago to the East (R. 340). Mechling claimed that this division supported its suspicions and allegations of discrimination against barge lines carrying corn to Chicago (R. 237). Such discrimination, it was urged, would violate Section 3(4) of the Interstate Commerce Act, 49 U.S.C. 3(4), which prohibits discrimination between connecting carriers. Mechling's position was that when corn comes to Chicago by rail over the Belt Line, and qualifies for the proposed rate, a credit of 13 cents is given to the New York Central by connecting carriers on rail movements to destinations in the East, whereas ex-barge corn is charged the full rate of 49 or 49.5 cents for the same movement from Chicago to the East. It was urged that this practice of charging less for ex-rail transportation than ex-barge transportation violated Section 3(4) (*Interstate Commerce Commission* v. *A. L. Mechling Barge Lines,* 330 U.S. 567) even when accomplished through a division of rates (*Dixie Carriers* v. *United States,* 351 U.S. 56) (R. 237, 342–3).

When Mechling sought to pursue this issue upon cross-examination of a witness, the hearing examiner blocked the inquiry upon the ground that it was not relevant in a Section 4 proceeding (R. 342–3, 352). Neither the examiner's report nor the Commission's decision discussed the Section 3(4) issue.

C. ALLEGATIONS THAT THE PROPOSED RATE WAS NOT COMPENSATORY

The protestants introduced evidence to show that the proportional rate to Kankakee was below the out-of-pocket costs which the New York Central incurred on this transportation. Therefore, it was charged, relief could not be granted under the exception to the proviso in Section 4. Moreover, it was argued that the non-compensatory proportional rate also violated Section 1(5) and the National Transportation Policy. The Section 4 argument was based on the premise that the rate to Kankakee was a rate "to or from the more distant point" which, under Section 4, must be reasonably compensatory if relief is to be granted (R. 25). The Section 1(5) argument was based on the premise that any rate which does not cover out-of-pocket costs is *per se* not "just and reasonable" (R. 112, 137, 197, 236–237, 241). The National Transportation Policy argument was based on the premise that the setting of a noncompensatory rate which captures traffic from the barge lines while producing no increase in revenue to the rail carrier is an "unfair or destructive" competitive practice (R. 112, 124, 189–190, 197, 238, 241).

The hearing examiner found that the proportional rate from the origins on the Belt Line to Kankakee

or Chicago was less than the out-of-pocket cost to New York Central (R. 49, 50, 51), and that the proposed rates were "lower than necessary to meet the barge competition" (R. 51). He therefore denied the rail carriers' request for Section 4 relief.

The Commission reversed the examiner. It stated that the proportional rate from origins on the Belt Line to Kankakee or Chicago "has no independent existence, but is an integral part of the rate which applies on the through transportation from Belt origin" to the East (R. 25). It reasoned that if it were to deny Section 4 relief because of a finding that the proportional rate was not reasonably compensatory although the through combination was, the railroads could cure the defect by merely refiling a new through-rate eliminating the proportional rates (R. 25). It also determined that since the barge lines attracted that corn grown adjacent to the river and the railroad attracted that corn grown adjacent to the Belt Line, the proposed rates were not lower than necessary to meet the barge competition and did not constitute destructive competition (R. 26, 28). The Commission therefore granted the Section 4 relief requested by the New York Central and its connecting carriers (R. 29–30).

5. PROCEEDINGS IN THE DISTRICT COURT

Appellants, Mechling Barge Lines, Inc. and several grain operators, brought an action in the district court to enjoin the order of the Commission. They alleged that the Commission's authorization of Section 4 relief was improper because the proposed rates were

not compensatory, were destructive of competition, and did not preserve the inherent low-cost advantage of the barge lines in violation of Section 4 and of the National Transportation Policy. They also alleged that the Commission erred in refusing to permit cross-examination concerning discrimination against barge transportation in violation of Section 3(4) (R. 7). The Chicago Board of Trade was permitted to intervene as plaintiff, and it challenged the Commission's order on the ground that the rates were unduly prejudicial against shippers and localities in violation of Section 3(1) (R. 64, 65).

The district court entered its judgment dismissing the complaint on September 18, 1962 (R. 81). It held that the Commission did not have to consider whether the proposed rates violated any other section of the Interstate Commerce Act in a Section 4 proceeding (R. 77); that there was substantial evidence to support the Commission's finding that a "special case" for the departure from Section 4 existed (R. 78–79); and that the rate was not lower than necessary to meet competition (R. 79–80). It also sustained the Commission's determination that the rate from origins on the Belt Line to Kankakee or Chicago was not the relevant one to consider in determining whether the proposed rate was reasonably compensatory (R. 78).

INTRODUCTION AND SUMMARY OF ARGUMENT

Section 4 of the Interstate Commerce Act, 49 U.S.C. 4, prohibits railroads from charging more for a shorter haul than for a longer haul along the same line. The same section gives the Interstate Commerce

Commission authority in "special cases" to permit such discrimination. The instant case arose out of an application by the New York Central Railroad and its connecting carriers asking that the Commission grant such "special case" relief from Section 4 for certain reduced rates on corn from origins on the New York Central's Belt Line when shipped East through Kankakee and milled in transit.

The Chicago Board of Trade contends that the Commission erroneously refused to decide whether the proposed rate discriminated against grain merchants dealing in whole corn and against Chicago interests in violation of Section 3(1) of the Act. A. L. Mechling Barge Lines, Inc. complains that it was not allowed to show that one feature of the proposed rate structure discriminated against connecting barge lines at Chicago in violation of Section 3(4) of the Act. Appellants also object to the Commission's failure to pass on the allegation that one of the components of the long-haul rate (the "proportional rate" from origins on the Belt Line to Kankakee) brought in no additional revenue to the railroads, and that it therefore violated Section 4 itself as well as Section 1(5), and unlawfully contravened the provisions of the National Transportation Policy.

The Commission decided only that the barge competition constituted a "special case," that the proposed rate was "reasonably compensatory," and that it did not constitute a destructive competitive practice. It refused to decide any of the other issues presented at the hearing. We believe that in the circumstances of this case the Commission's refusal to decide those is-

sues constituted error, and that its determination that the proposed rate did not amount to predatory competition was based on inadequate evidence.

I

The Commission erred, we believe, in refusing to pass on the Chicago Board of Trade's claim that the milling-in-transit limitation violated Section 3(1). Since all parties were on notice of the contention made in the pleadings, and evidence was introduced at the hearing in support of the allegation of discrimination, the Commission was obliged to decide the issue. The basis for its conclusion not to decide the question—that the claims "may be raised in investigation or complaint proceedings"—was a departure from the Commission's long-settled practice of consolidating protests based on other sections of the Act with Section 4 proceedings relating to the same proposed rate. The traditional practice is more likely to effectuate the objectives of the Interstate Commerce Act, which is a unified statutory scheme designed to eliminate discriminatory and predatory rate practices, and it is consistent with this Court's expressed understanding of the Commission's function in a Section 4 proceeding.

II

The evidence in the record was insufficient to sustain the Commission's conclusion that the proposed rate did not constitute a destructive competitive practice. It was undisputed that the rate did not cover the rail carrier's out-of-pocket cost, and this was suf-

ficient to establish a *prima facie* case of violation of the National Transportation Policy's prohibition against destructive competition. While the joint through rate under the proposed schedule may have been reasonably compensatory within the meaning of Section 4(1) of the Act, this did not, *ipso facto*, render the proportional rate reasonable. Since the rail carriers presented no evidence to support a conclusion that the rate was a profitable one, it follows that its effect was to divert traffic from the competing barge lines without producing any gain for the rail carriers. The fact that the reduced rate may have discouraged use of an alternative route which produced greater losses for the rail carriers does not establish that the below-cost rate amounted to fair competition.

III

The Commission failed to pass upon Mechling Barge Line's contention that the examiner had erroneously excluded evidence pertaining to alleged violations of Section 3(4). Although there may be acceptable reasons why the Commission, in its discretion, would prefer to leave such matters to separate proceedings, the actual reasons must be articulated so as to permit judicial review. In light of the established policy of determining all questions bearing on the validity of rates in a single proceeding, it was imperative for the Commission to explain its contrary decision in this case when the issue was raised in the petition for reconsideration.

ARGUMENT

I

THE COMMISSION SHOULD NOT HAVE GRANTED RELIEF UNDER SECTION 4 WITHOUT PASSING ON THE CONTENTION, RAISED IN THE PLEADINGS AND SUPPORTED BY EVIDENCE IN THE RECORD, THAT THE MILLING-IN-TRANSIT LIMITATION VIOLATED SECTION 3(1)

The Chicago Board of Trade's contention regarding the discriminatory nature of the proposed rates was set out in its protest and petition for suspension (R. 104–105, 179, 181, 186, 189). In response, the rail carriers assured the Commission that the discrimination would be eliminated (R. 256). At the outset of the hearing before the examiner, the Chicago Board of Trade's opposition to certain aspects of the proposed rates was reasserted (R. 292), and evidence pertaining to the alleged discrimination against grain merchants was introduced without objection (R. 365–368). Further evidence in this regard was placed in the record, again without objection, at a later stage of the hearing (R. 795, 798–799).

At the conclusion of the hearing, therefore, the issue raised by the Chicago Board of Trade's contention that the milling-in-transit limitation violated Section 3(1) was squarely before the examiner. The applicants had not objected to its consideration during the Section 4 proceedings, and the examiner had not excluded as irrelevant any evidence pertaining to this issue. Although the examiner's conclusion regarding other protests rendered unnecessary any decision on the Section 3(1) contention, the Commission's reversal of the examiner obliged it to consider the alternative

questions which the examiner had not had occasion to reach. The Commission's refusal to consider the alleged discrimination produced by the milling-in-transit limitation, on the ground that it was a matter "which may be raised in investigation or complaint proceedings" (R. 27), was not in our view, a permissible ruling.

Its effect was to compel the protestant to institute a new attack on the proposed rates three years after the original Section 4 application had been filed and to repeat the identical allegations and introduce the same evidence which was already in the record before the Commission. Since all parties to the Commission proceeding had been on notice of the issue, and since full opportunity to develop evidence on all sides had been afforded to the applicants and to the protestants, there was seemingly no occasion for requiring duplication of effort and further delay.

The Commission's own consistent policy—followed both before and after this decision—of disposing of as many related issues as possible in a single Section 4 proceeding supports the view that its action in this instance was an unsound departure from the settled rule. The usual Commission rule regarding consolidation of protests to rates which require Section 4 relief was stated in *Mississippi Railroad Comm'n* v. *Alabama & Vicksburg Ry. Co.*, 120 I.C.C. 569, 573:

> It is desirable in the interest of economy of time and expense, wherever practicable, to hear and dispose of fourth-section applications in connection with formal complaints or investigations involving the same rate under other

> sections of the Act. For that reason these portions of application No. 373 were set for hearing with certain of these cases. This policy has been followed for a number of years. So far as practicable it will be adhered to in the future, and we shall expect carriers to be ready to proceed in support of their fourth-section application at the time set. * * *

Although the above rule applies expressly only to consolidation of *formal* complaints or investigations, the Commission has repeatedly announced that it would not approve a Section 4 application (apparently irrespective of whether other formal complaints have been filed) if the proposed rates were shown to violate other provisions of the Act. As early as 1913, for example, the Commission said (*Railroad Commission of Nevada* v. *S.P. Co.*, 21 I.C.C. 329, 341):

> [T]he proviso authorizing this Commission to permit exceptions to the general prohibition of [Section 4] is not a grant of arbitrary or absolute power, but its exercise must be limited and conditioned upon the presence in special cases of conditions and circumstances which would make such exceptions legal and proper and in no wise antagonistic to other provisions of the act.

This principle has been restated in subsequent Commission decisions[5] and was even reaffirmed after the

[5] See *Transcontinental Cases of 1922*, 74 I.C.C. 48, 71; *Commodity Rates on Lumber and Other Forest Products, In Carloads, From South Pacific Coast Territory To Points In Central Freight Association Territory*, 165 I.C.C. 561, 569; *Differential Routes To Central Territory*, 211 I.C.C. 403, 421; *Bituminous Coal to Buffalo, N.Y.*, 219 I.C.C. 554, 560; *Pig Iron*

Commission's ruling in the present case. In *Bituminous Fine Coal to La Crosse, Wis.*, 311 I.C.C. 257, 263, the Commission recently stated:

> Competition has been the principal special case which we have recognized in granting [Section 4] relief. However, the existence of competition does not *ipso facto* entitle the applicant to relief. The competition relied upon must be examined in relation to the existing circumstances, bearing in mind that we may not grant relief to establish rates that may be in violation of other sections of the act.

This oft-repeated rule expressed an obligation which was not wholly self-imposed. In its Annual Report for 1920, the Commission acknowledged that the Interstate Commerce Act contemplated that it take a broad view of the effects of proposed rates requiring Section 4 relief before granting such an application (34 I.C.C. Ann. Rep. 47):

> In administering this section we proceeded upon the theory that the Congress intended that we should in proper cases exercise the power to grant relief, observing the rules laid down in the other sections of the act, and that

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To Butler, Pa., 222 I.C.C. 1, 2; *Iron and Steel To Minnesota*, 231 I.C.C. 425, 428; *Sand and Gravel to Northfield and Evanston, Ill.*, 234 I.C.C. 65, 68; *Iron and Steel from Minnequa to Kansas, Nebraska, and South Dakota*, 278 I.C.C. 163, 168–169; *Coal and Coal Briquets in the South*, 289 I.C.C. 341, 376–377; *Passenger Fares, Hell Gate Bridge Route, New York, N.Y.*, 296 I.C.C. 147, 153; *Crude Barytes Ore from Missouri to Corpus Christi and Houston*, 299 I.C.C. 505, 508; *Nepheline Syenite from Ontario, Canada, to the East*, 308 I.C.C. 561, 564–565; *Bituminous Fine Coal to La Crosse, Wis.*, 311 I.C.C. 257. See also quotations in Appendix B to the Brief Filed in this case by the Chicago Board of Trade.

> it was appropriate to grant relief when, in our opinion, the resulting rates or fares would not be unjust or unreasonable in violation of the first section or unduly prejudicial in violation of the third section.

Since "the principal evil at which the Interstate Commerce Act was aimed was discrimination in its various manifestations," *New York* v. *United States*, 331 U.S. 284, 296; see *Louisville & N.R. Co.* v. *United States*, 282 U.S. 740, 749–750, it accords with the legislative purpose to apply all the Act's prohibitions against discrimination "as a whole" whenever practicable. In reporting out the Act after an extensive investigation, the Senate Committee on Interstate Commerce stated (S. Rep. No. 46, 49th Cong., 1st Sess., 215 (1886)):

> The provisions of the bill are based upon the theory that the paramount evil chargeable against the operation of the transportation system of the United States as now conducted is unjust discrimination between persons, places, commodities, or particular descriptions of traffic. The underlying purpose and aim of the measure is the prevention of these discriminations, both by declaring them unlawful and adding to the remedies now available for securing redress and enforcing punishment. * * *

The interrelation of the Act's various prohibitions led this Court to conclude in the *Intermountain Rate Cases*, 234 U.S. 476, 485–486, that the Commission's power to relieve carriers from the requirements of Section 4

> * * * is made by the statute to depend upon

> the facts established and the judgment of that body in the exercise of a sound legal discretion as to whether the request should be granted compatibly with a due consideration of the private and public interests concerned *and in view of the preference and discrimination clauses of the second and third sections.* [Emphasis added.]

This construction of Section 4 follows from the observation that the specific prohibition of Section 4 is merely a particularized condemnation of a kind of discriminatory practice which Congress believed pernicious enough to warrant special treatment. See Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 Harv. L. Rev. 863, 884 (1962). The provision in Section 4 for relief by the Commission in special cases of long haul-short haul discrimination ought not therefore to be read as authorizing the Commission to countenance rates which are otherwise discriminatory.

The unitary design of the Interstate Commerce Act is further emphasized by the enactment in 1940 of the National Transportation Policy, which expressly directed that the Interstate Commerce Act "shall be administered with a view to carrying out" the purposes set forth in the declaration of policy. Among these purposes was the desire "to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; * * *" 54 Stat. 899.

In light of this background, it is apparent that the legislative purpose is best furthered by the consistent course followed by the Commission in other cases—*i.e.*, consolidating all charges of discrimination with the formal Section 4 application and determining, in a single proceeding, whether the rates violate other provisions of the Act as well as whether the criteria set forth in Section 4 have been met. Such consolidated treatment would, in all but exceptional cases, expedite disposition of all protests and prevent duplication of effort. There may, of course, be sound practical reasons why this procedure cannot always be followed. For example, the Commission could not realistically be expected to explore fully all the implications of filed rates which give rise to the hundreds of Section 4 applications which are treated summarily each year.[4] It would therefore be unfair to the Commission to render such a Section 4 order vulnerable because of some discriminatory effect which no party had ever called to the Commission's attention. Or it may be unfair to the applying carrier if its proposed rate is held to violate some provision of the Act other than Section 4 without notice to it or other interested parties that the alleged discriminatory effect is being considered. Similarly, there may be situations in which the Commission, after due consideration, would conclude that separate proceedings on different con-

[4] In the years 1958–61, the Commission received an average of 818 applications for Section 4 relief annually. Supplement to the 75th Annual Report of the Interstate Commerce Commission, p. 64. In the fiscal year ended June 30, 1962, the Commission received 584 applications for Section 4 relief. Only two formal reports relating solely to Section 4 matters were issued. 76th Ann. Rep. 43.

tentions would facilitate disposition of the case. Such a decision would lie within the agency's permissible discretion concerning the conduct of its own proceedings.

But when, as here, the Commission has permitted full development of the issue by way of pleadings and evidence, there appears to be no practical reason to force the parties to begin anew. Considerations of convenience apart, the consequence of such a course is to maintain, for such further period as is required to institute and conclude the new proceeding, a rate which may violate the Act and the National Transportation Policy.

United States v. *Merchant & Manufacturers Traffic Ass'n*, 242 U.S. 178, relied upon by the district court, concerned a belated claim of discrimination made by four cities and their shipping interests. They had not been parties to the Section 4 proceeding wherein certain railroads had been granted relief from the long haul-short haul provision. This Court, speaking unanimously through Mr. Justice Brandeis, observed that the only "necessary party" to a Section 4 proceeding was the applying carrier, and that others were not bound by the resulting order, "at least in the absence" of participation at the hearing. 242 U.S. at 188. Accordingly, the Court concluded that these interests could not initiate an attack on the Section 4 order in the courts, but were obliged to seek relief from the Commission under Sections 13 and 15, which "afford ample remedy." *Ibid.* This decision patently would not apply when the claim of discrimination has been fully presented in the course of the Section 4 proceeding, as in the present case, and when

the protestant has been an active party during the hearing. There is then no danger that such a procedure "would invade and often nullify the administrative authority vested in the Commission." *Ibid.* Indeed, when the allegation of discrimination has been fully presented to the Commission by a party in the Section 4 proceedings, the shoe is on the other foot; the Commission should then be required to decide the issue if its decision is dispositive. For then the principle announced by this Court in *The Chicago Junction Case,* 264 U.S. 258, 265, comes into play: "The provision for a hearing implies both the privilege of introducing evidence and the duty of deciding in accordance with it. To refuse to consider evidence introduced or to make an essential finding without supporting evidence is arbitrary action."

The district court also relied on language in the opinion of a three-judge district court in *Seatrain Lines, Inc.* v. *United States,* 168 F. Supp. 819 (S.D. N.Y.), which expressed the view that the question "whether the rates charged are unduly discriminatory against a competing water carrier * * * must be raised by proceedings under Sections 13 and 15 of the Interstate Commerce Act." 168 F. Supp. at 824. This view is inconsistent with the Commission's own announced practice to consider all provisions of the Act before granting a Section 4 application. See note 5, *supra.* Since no evidence pertaining to alleged discrimination had been presented to the Commission in *Seatrain* (because no hearing was held), it seems probable that the district court was merely reaffirming the rule of *Merchants & Manufacturers Traffic Ass'n, supra,* that protestants who have not presented their

contentions to the Commission in a Section 4 proceeding have an "ample remedy" via Sections 13 and 15. The court was not addressing itself to a situation like the present one in which the protest and supporting evidence have been allowed, without objection, at the Section 4 hearing. If the *Seatrain* opinion was intended to hold that these issues *could* not be raised in a Section 4 proceeding, we believe it to have been in error.

Nor would it be an adequate justification for the procedure followed that the protestants failed to file a formal document titled "Complaint Under Section 13(1)." That would be to exalt form over substance to no purpose.[1] All parties were on notice of the contention made under Section 3(1) by the Chicago Board of Trade, and the issue was fully developed at the hearing without any objection from the appli-

[1] In its Motion to Affirm, the Commission suggested that a difference in the allocation of the burden of proof on the issue of discrimination would result if protestants had filed a separate complaint under Section 13(1) (p. 20, fn. 23). Assuredly, the burden of establishing a prima facie case of discrimination should be borne by protestants. *Atchison, Topeka & Santa Fe R. Co.* v. *United States*, 218 F. Supp. 359, 374–5; *Koppers Co.* v. *United States*, 166 F. Supp. 96, 99–100. There is no reason, however, for the burden to shift because the protestants seek to raise issues of discrimination by way of protests and petitions for suspension rather than by a formal complaint under Section 13(1). The Commission has the power to impose the burden of proof on the proper party, without regard to the section of the Act under which the parties have brought the matter before the Commission.

cants or the hearing examiner.[8] No suggestion was made by any party that the failure to file a separate document would bar consideration of the protestants' claim; such technical niceties have no place in the administrative process and should not belatedly put to naught the parties' full presentation of the issue.

Nor did the Commission's incorporation of its standard concluding clause in the temporary Section 4 order and the denial of suspension put the Chicago Board of Trade on notice that a separate document would have to be filed. Although these orders did provide that the proposed rates were "subject to complaint, investigation and correction if in conflict with any provision of the Interstate Commerce Act" (R. 89) and that the refusal to suspend "does not constitute approval of the protested schedules" (R. 90), the protestant was entitled to construe this language in light of the Commission's repeated assertions that Section 4 relief would not be granted if other violations of the Act were demonstrated. See note 5, *supra*. Under these circumstances, the most reasonable construction of this clause—which also appears on the Commission's permanent Section 4 order (R. 30)—is that the proposed rates, like all rates filed with the Commission, are subject to examination and reexamination whenever allegations of discriminatory effect are made.

[8] Since the issue was litigated during the hearing, the rail carriers could not object to an appropriate order, notwithstanding the absence of any formal complaint. See *Kuhn* v. *Civil Aeronautics Board*, 183 F. 2d 839 (C.A.D.C.); *National Labor Relations Board* v. *Sterling Furniture Co.*, 202 F. 2d 41 (C.A. 9).

Finally, the rail carriers' representation that the milling-in-transit limitation, which produced the discrimination, would be eliminated did not justify the Commission's refusal to consider the issue. If the discriminatory effect of the limitation rendered the proposed rate unlawful, it was the Commission's obligation to take appropriate action. By failing to do so, it effectively denied to the protestants any remedy *pendente lite*.[9]

II

THE COMMISSION'S CONCLUSION THAT THE PROPOSED RATES DID NOT VIOLATE THE NATIONAL TRANSPORTATION POLICY'S PROHIBITION AGAINST DESTRUCTIVE COMPETITIVE PRACTICES WAS NOT SUPPORTED BY ADEQUATE FINDINGS OR SUBSTANTIAL EVIDENCE

A. THE NON-REMUNERATIVE PROPORTIONAL RATE APPEARS TO HAVE BEEN PREDATORY

The evidence presented to the examiner established that even after all the rail carrier's adjustments in out-of-pocket cost computation had been made, the cost figure per 100 pounds on an average load and trip on the Belt Line exceeded the proposed rate by almost

[9] It is no answer to this argument to say that the protestants, who have sought judicial review of the Commission's order, are responsible for whatever damage is caused while the order is being reviewed. Even if it be assumed that the milling-in-transit limitation would have been voluntarily eliminated had no review been sought, the protestants would have been required to relinquish other claims asserted in this action in order to accomplish this result. Hence the price of obtaining the elimination of a discriminatory limitation would have been abandonment of other contentions which relate to different aspects of the proposed rates.

1.5 cents (R. 48). The examiner was of the opinion that the actual cost figure was higher than that urged by the rail carriers, but he accepted the lower figure *arguendo* (R. 48–49). The Commission did not disagree with this phase of the examiner's report, although it included in its decision only the examiner's summary of the protestants' cost figures—which were, of course, considerably higher than those presented by the rail carriers (R. 25). Consequently, the record establishes, beyond dispute, that the Belt Line portion of any through transportation under the new rates is non-remunerative.

The Commission reversed the examiner's finding that the proposed rate was non-compensatory, however, because it observed that the proportional rate to Kankakee "has no independent existence, but is an integral part of the rate which applies on the through transportation from Belt origin * * * to delivery of the corn product at its ultimate destination" (R. 25). Since the rail carriers could have chosen to publish only the joint through rate from Belt Line origins to eastern destinations, and since these rates would have been evaluated as published, the Commission concluded that it would be unfair to the rail carriers to condemn the proposed rates because of "the method of publication" (R. 25).

We agree with the Commission's analysis insofar as it relates to the proviso in Section 4(1) which allows the Commission to grant relief from the long haul-short haul prohibition so long as it does "not permit the establishment of any charge to or from the more distant point that is not reasonably compensa-

tory for the service performed." In other words, we agree that the legislative history of the statute,[10] as well as its plain terms, support a construction which prohibits the granting of Section 4 relief only if the total rate for a *longer* haul is not compensatory. Since the figures which are to be compared in this case are the rate for the short haul from Kankakee to the eastern destination and the rate for the long haul from the Belt origin to that destination, the Commission properly rejected the protestants' contention that Section 4 relief was prohibited because the proportional rate from the Belt origin to Kankakee (only part of the long haul) was non-compensatory.

This did not, however, dispose of the distinct contention that the proposed proportional rate from the Belt origin to Kankakee was so low as to amount to a destructive competitive practice. The National Transportation Policy's proscription of unfair and destructive rates was intended, as this Court observed last Term in *Interstate Commerce Commission* v. *New York, New Haven & Hartford R. Co.*, 372 U.S. 744, 759, "to prevent a carrier from setting a rate which would impair or destroy the inherent advantages of a competing carrier, for example, by setting a rate, below its own fully distributed costs, which would

[10] The only indication of the meaning of this exception to the proviso was given by Senator Townsend, who said (59 Cong. Rec. 740):

"It has been wrong and is so now to fix the longer-haul rate so low that in itself it is not compensatory; that is, it does not yield its proper portion of the expense of operation of the railroad system. Then it stands to reason that shorter routes paying the higher proportioned rate must have an additional burden placed upon them. That is wrong."

force a competitor with a cost advantage on particular transportation to establish an unprofitable rate in order to attract traffic." The evil is as possible when the reduced rate is a proportional one as when it is a flat rate. If, for example, carriers *X* and *Y* compete between points *A* and *B*, but only *X* also provides carriage from *B* to *C*, *X* may destroy *Y's* inherent competitive advantage by reducing its proportional rate from *A* to *B* below cost. Even if its joint through rate from *A* to *C* remains compensatory, the reduced proportional rate would compel *Y*, the inherently superior carrier, to offer a nonremunerative rate on traffic destined beyond *B* so as to meet *X's* competition. In order to forestall such a result, the Commission has the duty to consider each factor of a through rate and to determine whether it is destructively competitive *vis-a-vis* any other carriers which provide the same transportation. As this Court, speaking through Mr. Justice Brandeis, said in *Atchison, Topeka & Santa Fe R. Co.* v. *United States*, 279 U.S. 768, 776:

> The Commission's power to declare rates unreasonable applies alike to all rates, be they joint, local or proportional. The Commission may, and in controversies involving through rates often does, deal with one factor only of the combination of rates which make up the through rate. And that factor may be a proportional rate.

In the present case, the barge lines operating along the Illinois River provided transportation from points along the Belt Line to Chicago; ex-barge rail trans-

portation to the East was then available at proportional rates identical to shipments traveling ex-rail through Kankakee. By reducing the proportional rail rate to Kankakee below its own out-of-pocket costs, the New York Central appears to have diverted traffic from the competing barge lines with no profit to itself. Since the record fails to demonstrate that the reduced proportional rate for Belt Line traffic generated any additional traffic for the New York Central from Chicago or Kankakee to the East, the only apparent product of the rate reduction was loss of revenue to the barge lines.

The Commission stated, in conclusory terms, that the proposed rates did not amount to a destructive competitive practice (R. 26, 29). It failed to support this conclusion with any evidence or economic analysis. The examiner's uncontested finding that the proposed rate did not cover out-of-pocket costs constituted a sufficient *prima facie* case of violation of the National Transportation Policy to require the Commission to do more than it did as a basis for granting Section 4 relief.

B. THE NON-REMUNERATIVE RATE IS NOT JUSTIFIED BY THE FACT THAT IT PRODUCES A SMALLER LOSS FOR THE RAIL CARRIERS THAN IS INCURRED ON AN ALTERNATIVE ROUTE

At the hearing the rail carriers sought to prove that the low proportional rate from Belt origins to Kankakee was profitable notwithstanding its failure to cover out-of-pocket costs because it produced more revenue for New York Central than did carriage of ex-barge corn from Chicago to the East via Kankakee. This was because reshipping rates to the East were the

same from Chicago and Kankakee, and shipment through Chicago included the right to stop at Kankakee for milling (R. 303). In other words, corn which was shipped by barge from Belt orgins to Chicago could then be reshipped via Kankakee to the East at the same rate as corn transported by rail to Kankakee; New York Central was, in effect, providing free carriage over the 75 miles from Chicago to Kankakee for ex-barge corn milled at Kankakee. Hence it was urged that any shipments traveling via the Belt Line to Kankakee, which would otherwise have been transported by barge, produced a net gain equal to the proposed proportional rate (which was then 5½ cents) and whatever saving resulted from the elimination of switching costs at Chicago (approximately 2 cents per 100 pounds) (R. 304–305). Believing that this "added revenue spoke for itself" (R. 321), the rail carriers had made no cost study whatever before filing the proposed schedule.

Although it may well be true that the rail carriers reduced their losses by encouraging transportation from Belt origins to Kankakee in place of shipments from Chicago to Kankakee (after carriage by barge from the Belt origins),[11] this consequence does not sustain the proposed rate against an attack based on the National Transportation Policy. For reasons which

[11] This argument assumes that all the corn being transported along the Belt Line under the proposed rate would otherwise have been shipped to the East via Kankakee. The record fails to support this assumption. If, contrary to this assumption, much of the corn transported along the Belt Line would have been shipped to the East directly from Chicago, the rail carriers' calculation is patently erroneous, since no saving whatever is produced by shipment via Kankakee.

do not appear in the record, rail carriers had offered free carriage from Chicago to Kankakee for corn traveling to the East. The barge line, which was competing only between the Belt Line and Chicago or Kankakee and which was not affected adversely by the proportional rate from Chicago to Kankakee, had no reason to object to its non-remunerative character. It would be unfair now to permit the rail carriers to reduce their rates for the competitive route from the Belt origins to Kankakee below out-of-pocket cost—a step which would patently have been a destructive competitive practice had it been taken initially—on the asserted ground that this will reduce the loss incurred on the obviously unprofitable leg from Chicago to Kankakee. The rail carriers' own rate structure from Chicago to the East would thereby become a justification for otherwise unwarranted predatory competition. Indeed, the very same computation which is urged as support for the proposed rate could be used to prove the profitability of *free* carriage from Belt origins to Kankakee—even if there were no charge whatever for that portion of the shipment, the 2-cent switching expense would be saved for every 100 pounds of corn transported on the Belt Line rather than by barge to Chicago. This *reductio ad absurdum* demonstrates that whether or not a rate is predatory within the meaning of the National Transportation Policy cannot be made to depend on whether it has the effect of discouraging use of some other route on which the carrier incurs a loss. Even if a proposed rate increases a carrier's total revenue in this fashion, it constitutes a destructive

competitive practice if it is non-remunerative. The only apparent choices consistent with the national policy prohibiting destructive competition are (1) to adjust the rates on the unprofitable alternative route or (2) to set a rate which covers out-of-pocket or fully distributed costs.

III

THE COMMISSION SHOULD HAVE DECIDED WHETHER THE EXAMINER ERRONEOUSLY EXCLUDED EVIDENCE THAT ADMINISTRATION OF THE PROPOSED RATES RESULTED IN VIOLATIONS OF SECTION 3(4)

Mechling Barge Lines also sought to show that the proposed rate structure results in discrimination against connecting carriers, in violation of Section 3(4), because New York Central receives a 13-cent division of the rate east of Chicago from its connecting carriers when the traffic moves to Chicago via Kankakee on the proposed proportional rate. Since the barge lines did not receive any comparable division of this rate, they contended that Section 3(4) has been violated. The practice of charging less for ex-rail transportation than ex-barge transportation violates Section 3(4), *Interstate Commerce Commission* v. *A. L. Mechling Barge Lines,* 330 U.S. 567, whether accomplished by the use of joint rates, through rates, *Dixie Carriers* v. *United States,* 351 U.S. 56, or rate divisions, *Arrow Transportation Co.* v. *United States,* 176 F. Supp. 411, affirmed *sub nom. State Corporation Commission of Kansas* v. *Arrow Transportation Co.,* 361 U.S. 353. When counsel for the barge line tried to continue his cross-examination on the possible violation of Section 3(4), the hearing

examiner ruled that this issue was not relevant (R. 342–3, 352). The Commission did not mention the alleged violation of Section 3(4) in its report."

We agree that the Commission's discretionary determinations regarding its own procedures are entitled to great weight, and that there may have been acceptable reasons in this case for the exclusion of evidence pertaining to alleged violations of Section 3(4). But in light of the Commission's consistent practice of consolidating all protests to proposed rates which require Section 4 relief, and of the support for this practice in the Act's language and legislative history and in this Court's construction of the Act (see pp. 20–26, *supra*), the reasons underlying this ruling should be judicially reviewable." In the present case, the Commission foreclosed judicial review by supplying "no findings and no analysis * * * to justify the choice made, no indication of the basis on which the Commission exercised its expert discretion." *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 167. If, as may be inferred from the Commission's disposition of protests filed by the Chicago

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[12] When the case first came before Division 2 of the Commission, the barge lines supported the examiner's proposed report. Consequently, the examiner's exclusion of evidence pertaining to a Section 3(4) violation was not put in issue. After Division 2 ruled in favor of the rail carriers, however, the barge lines' contention that this evidence should have been admitted was made on petition for reconsideration. This petition was denied without explanation (R. 31).

[13] Compare, for example, *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U.S. 197, 229, where an agency's exclusion of evidence was termed "unreasonable and arbitrary" by this Court.

Board of Trade, it was of the opinion that the appropriate remedy for alleged Section 3(4) violations was a complaint proceeding under Section 13(1) or a Commission-initiated investigation under Section 15(7), this view was not expressed in any "findings specifically directed to the choice between two * * * remedies * * *." 371 U.S. at 168. Consequently, the case should be remanded for further proceedings in which the Commission should pass expressly on the contention that the examiner erroneously excluded the proffered evidence.

CONCLUSION

Accordingly, the United States believes that the judgment of the district court should be vacated and the district court directed to enter judgment setting aside the order of the Commission in these cases and remanding them to the Commission for further proceedings consistent with the principles set forth above.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
WILLIAM H. ORRICK, JR.,
Assistant Attorney General.
ROBERT B. HUMMEL,
GERALD KADISH,
Attorneys.

DECEMBER 1963.

APPENDIX

The National Transportation Policy, 49 U.S.C. preceding Section 1, provides:

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Section 1(5), 49 U.S.C. 1(5), provides:

> All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such serv-

ice or any part thereof is prohibited and declared to be unlawful.

Section 3(1), 49 U.S.C. 3(1), provides:

> It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

Section 3(4), 49 U.S.C. 3(4), provides:

> All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term "connecting line" means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III.

Section 4(1), 49 U.S.C. 4(1) provides:

> It shall be unlawful for any common carrier subject to this part or part III to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this part or part III, but this shall not be construed as authorizing any common carrier within the terms of this part or part III to charge or receive as great compensation for a shorter as for a longer distance: *Provided,* That upon application to the Commission and after investigation, such carrier, in special cases, may be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property, and the Commission may from time to time prescribe the extent to which such designated carriers may be relieved from the operation of the foregoing provisions of this section, but in exercising the authority conferred upon it in this proviso, the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and no such authorization shall be granted on account of merely potential water competition not actually in existence * * *.

Section 13(1), 49 U.S.C. 13(1), provides:

> That any person, firm, corporation, company, or association, or any mercantile, agricultural or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this

part, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

Section 15(7), 49 U.S.C. 15(7), provides:

Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such

schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after the date this amendatory provision takes effect, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

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Nos. 58 and 59

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

A. L. MECHLING BARGE LINES, INC., et al.,
Appellants,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION.

BOARD OF TRADE OF THE CITY OF CHICAGO,
Appellant,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE NEW YORK CENTRAL RAILROAD COMPANY, et al.

On Appeal From The United States District Court For The Northern District of Illinois, Eastern Division.

BRIEF FOR APPELLEE THE NEW YORK CENTRAL RAILROAD COMPANY

RICHARD J. MURPHY
1225 LaSalle Street Station
Chicago 5, Illinois
Attorney for The New York Central Railroad Company, Appellee

McCORMICK AND HENDERSON, INC., CHICAGO

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On Appeal From The United States District Court For The Northern District of Illinois, Eastern Division.

BRIEF FOR APPELLEE THE NEW YORK CENTRAL RAILROAD COMPANY

I.

OPINION BELOW.

These appeals are from a final judgment entered by a three-judge district court, reported at 209 F.Supp. 744, which dismissed a complaint seeking to set aside and enjoin Fourth Section Order No. 19346 of the Interstate Commerce Commission entered June 8, 1960, after hearing on the railroads' Fourth Section Application No. 33955, in *Corn and Corn Products, Illinois to Official Territory*, 310 I.C.C. 437.

II.

STATUTES INVOLVED.

This appeal involves the National Transportation Policy, preceding 49 U.S.C. §1, and Sections 1(5), 3(1), 3(4), 4(1), 13(1), 15(1), 15(7), and 17(3) of the Interstate Commerce Act; 49 U.S.C. 1(5), 3(1), 3(4), 4(1), 13(1), 15(1), 15(7), and 17(3). The text of these provisions is set forth in our Appendix hereto.

III.

STATEMENT.

A. Background of the Case.

Appellee, The New York Central Railroad Company, operates a line of railroad known as its Kankakee Belt which extends from South Bend, Indiana, through Kankakee, Illinois, and westward to Zearing, Illinois (R. 295). That portion of the line west of Kankakee to Moronts, Illinois, roughly parallels the Illinois River in Northern Illinois (R. 295, Exhibit 1).[1] It serves a rural territory and

[1] The exhibits identified in the record before the Commission are part of the record on appeal, but are not printed. By stipulation, they may be referred to. Wherever exhibits are referred to, they are the exhibits which were identified at the Commission hearing.

originates or terminates only an insignificant volume of traffic other than grain (R. 295). There is very little business available to the New York Central from the stations west of Kankakee except the bountiful surplus of corn which is grown there (R. 298). As found by the Commission, at one time that corn moved via all-rail routes to eastern destinations. (R. 13).

With the development of the Illinois Waterway in the mid 1930's, the corn was drawn away from the railroad to the River for barge movement and the West End of the Kankakee Belt was left almost barren of traffic and revenues. The situation was so serious that the New York Central considered abandonment of a portion of the line (R. 409).

The impact of the barge competition also was felt by the operators of small country elevators located along the West End of the Kankakee Belt. As to these country elevators, the Commission found that the rate advantage of the barge route relegated them "for the most part, to such operations as was necessary to process corn for retail locally (R. 27)."

That competitive situation which had virtually dried up the business of the railroad and elevators at the stations west of Kankakee caused the New York Central to establish rates that would meet the competition of the barge route (R. 296-297).

The barge rates to Chicago, Ill., from the Illinois River Ports[2] that were competitive with the rail stations on the Kankakee Belt, averaged 4.625 cents in December, 1956 (Exhibit 7, R. 12). Corn and corn products moved on the

[2] Lockport, Joliet, Morris, Seneca, Ottawa, LaSalle, Spring Valley, Hennepin, Henry and Lacon, Ill. (Exhibits 1 and 2).

combination of those barge rates plus the proportional[3], or reshipping rates, from Chicago to destination. The proportional rate on ex-barge corn from Chicago to the East is the same as the proportional rate on ex-rail corn to the same destinations. Inasmuch as the proportional rates from both Kankakee and Chicago to Eastern destinations are identical, the New York Central elected to meet that competition by establishing a proportional rate factor to Kankakee that would be competitive with the barge rates to Chicago. Thus the combination rates[4] via Kankakee would be competitive with the combination of the barge rate to Chicago and the proportional rail rates beyond (R. 299-300). No change was made in the proportional rates from either Kankakee or Chicago (R. 300).

The New York Central published a proportional rate of 5 cents per hundred pounds on corn and corn products when milled in transit, from its stations west of Kankakee to Kankakee over its direct line for application in connection with the existing proportional or reshipping rates beyond to eastern destinations (R. 11, 300). That proportional rate became effective December 15, 1956, without protest or objection (R. 12). It was increased to 5½ cents prior to the hearing and is now 6 cents[5] (R. 11). As the exhibits at the hearing were based on the 5½ cent rate, it is discussed at that level. The barge rate was increased to 4.825 cents in December 1957 (R. 299).

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[3] A proportional rate is one restricted so as to be applicable only on traffic having prior or subsequent transportation and is only a portion of the total transportation charge.

[4] A combination rate is a total rate composed of two or more rate factors. A flat rate is a rate of unrestricted application which is not dependent upon any prior or subsequent transportation.

[5] The 5½ cent rate to Kankakee and the reshipping rates from Kankakee and Chicago are proportional rates and have no independent application.

The following table showing the rates per hundred pounds to New York, N.Y. is illustrative of the rate situation at the time of the hearing (R. 303).

Via Barge Route		Via All-Rail Route	
Barge Rate to Chicago	4.825¢	Proportional Rate to Kankakee	5.5¢
Chicago Reshipping Rate	54.000¢	Kankakee Reshipping Rate	54.0¢
Combination Rate	58.825¢	Combination Rate	59.5¢

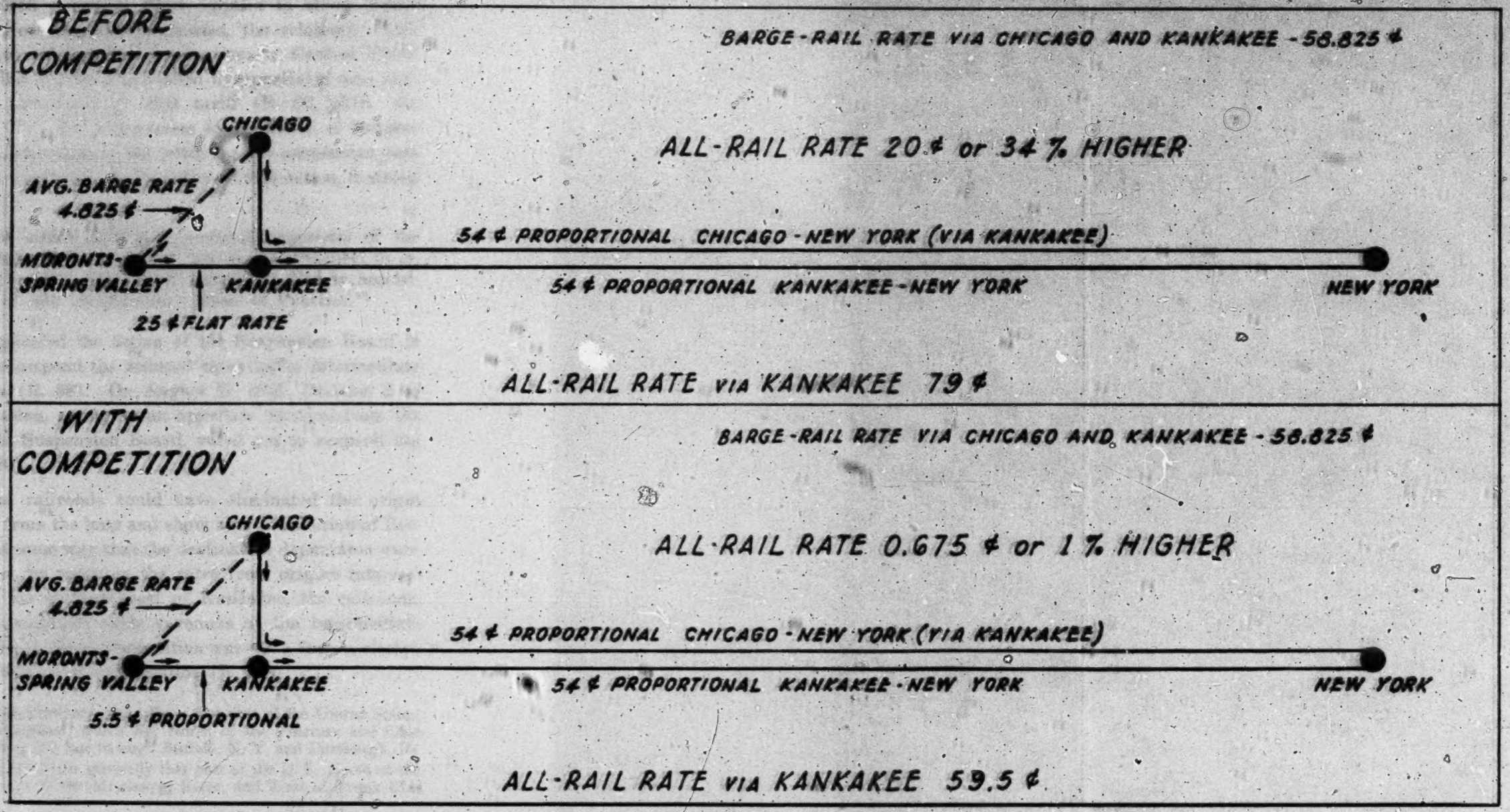
The diagram on the facing page illustrates the rate situation schematically.

No fourth section application was filed in connection with the publication of the proportional rate to Kankakee in November 1956. The rates via both Chicago and Kankakee are subject to identical provisions of previously issued fourth section orders. The barge-rail combination rates via Chicago to the east had for many years been less than the through rate from Chicago and intermediate origins in Indiana. It was New York Central's belief that since outstanding fourth section relief applied to the barge-rail route, it also applied to the all-rail route via Kankakee (R. 300). However, it was subsequently discovered that the rate publication caused unauthorized origin and destination departures from the requirement of section 4 of the Interstate Commerce Act which prohibits the charging of higher rates for a long haul than for a shorter included haul over the same line.

To eliminate the destination departures, *i.e.*, the charging of higher rates to intermediate destinations than to more distant destinations, the rates to the intermediate destinations were reduced by tariffs which were published to become effective August 29, 1957 (R. 300-301). Unlike the

COMPETITIVE SITUATION ALL-RAIL VS BARGE-RAIL RATES BEFORE AND AFTER RATE ADJUSTMENT

(ADJUSTED TO COMPENSATE FOR GENERAL RATE INCREASES OCCURRING PRIOR TO DATE OF HEARING) *



* WHILE THIS RAIL REDUCTION BECAME EFFECTIVE ON DECEMBER 15, 1956, ALL RATES, INCLUDING THE BARGE RATE, WERE INCREASED PRIOR TO THIS COMMISSION HEARING. FOR COMPARITIVE PURPOSES ALL RATES ARE STATED AT THE LEVEL THEY WOULD HAVE BEEN AT THE DATE OF THE HEARING (EXHIBIT 61, PP 3-5)

BARGE RATE - - -
RAIL RATE ———

December 1956 reduction which applied to all of Trunk Line[6] and New England territories, the relatively small reductions to intermediate destinations in Central Territory[7] (Exhibit 11) were protested by appellants who petitioned for suspension of that tariff (R. 96, 133). On August 26, 1957, the Commission by its Board of Suspension on consideration of the petitions for suspension concluded not to suspend. In its notice of that action, it stated that (R. 87):

> "This action does not constitute approval of the protested schedules. They may be made subject to investigation through formal complaint filed in accordance with the Commission's Rules of Practice."

Mechling appealed the action of the Suspension Board in declining to suspend the reduced rates to the intermediate destinations (R. 88). On August 27, 1957, Division 2 of the Commission, acting as an appellate division from the action of its Suspension Board, voted not to suspend the tariff (R. 90).

While the railroads could have eliminated the origin departures from the long and short haul prohibition of Section 4 in the same way that the destination departures were removed, *i.e.*, by reducing the rates from origins intermediate from the stations west of Kankakee, the railroads, desiring to maintain their revenues at the intermediate origins at which barge competition was not a factor, elected to file a fourth section application (R. 138).

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[6] Trunk Line Territory generally is that part of the United States, except New England, which lies North of the Potomac and Ohio Rivers and East of a line through Buffalo, N. Y. and Pittsburgh, Pa.

[7] Central Territory is generally that part of the U. S. North of the Ohio River, East of the Mississippi River, and West of Trunk Line Territory.

The fourth section origin departures which were the subject of the application herein occur only on direct routes (R. 10). Chicago, Illinois is not on the direct rail routes from the origins west of Kankakee, Illinois to the destinations involved (R. 150).

Illustrative of the origin fourth section departures via direct routes is the following table which shows the rates and distances from Moronts, Illinois, a station west of Kankakee on the Kankakee Belt to New York, N.Y., and the rates and distances from the first and last higher-rated origin stations intermediate from Moronts via the direct route (Exhibit 21).

	Distance to New York, N. Y. (Miles)	Rate on Corn Products to New York, N. Y. (Cents per 100 lbs.)
Moronts, Ill.	991.3	59.5 (Combination rate)
Kankakee, Ill. (First higher-rated intermediate point)	907.8	72.0
Hamilton, Ind. (Last higher-rated intermediate point)	740.3	61.0

Appellants by petitions (separate from their petitions for suspension) objected to the issuance of the fourth section relief (R. 177, 234). However, the Commission's Fourth Section Board, by order entered August 27, 1957, entered temporary Fourth Section Order No. 18784 in which it stated that (R. 89):

> "The Commission does not hereby approve any rates that may be filed under this authority, all such rates being subject to complaint, investigation and correction if in conflict with any provision of the Interstate Commerce Act."

The order of the Fourth Section Board was appealed by Mechling (R. 90), and Division 2 of the Commission, acting as an appellate division, voted to sustain the action of the Fourth Section Board. The Notice of that action, dated August 28, 1957, states that (R. 92):

> "The action of the Fourth Section Board and of Division 2 does not constitute approval of the rates. They may be subject to an investigation through formal complaint filed in accordance with the Commission's Rules of Practice."

The Commission set the railroads' application for fourth section relief for hearing (R. 92-94), but did not institute an investigation under Sections 15(1) or 15(7) of the Act into the lawfulness under other sections of the Act of the rates that became effective in 1956 without protest, or of the protested rates that were published to become effective August 29, 1957. Appellants did not file a complaint under Section 13 of the Act assailing the lawfulness of rates under other sections of the Act and the case went to hearing solely "in the matter of the fourth-section relief sought (R. 11)".

B. The Commission Hearing.

Appellants appeared at the hearing as protestants in opposition to the granting of the railroads' fourth section application (R. 291-292). At that hearing the railroad applicants presented evidence addressed to the issues presented by the fourth section application, those issues being whether or not the rates are no lower than necessary to meet competition; are reasonably compensatory; whether the rates from the intermediate origins are reasonable; and whether the competitive situation at the more distant origins differed from that at the intermediate origins so as to justify exemption from the requirements of Section 4.

1. Competitive Issue.

Because the rates had been in effect during the year prior to the hearing, their competitive effect had been tested by the actual flow of the traffic and evidence of that movement was presented at the hearing. The following table shows the barge movement of corn via the Illinois River to Chicago and the rail shipments of corn from the Kankakee Belt stations involved both prior to and subsequent to the publication of the competitive rates on December 15, 1956:

	CORN (Bushels)		
	Barge[A] Receipts at Chicago	Barge Shipments from 10 competitive Ports to Chicago	Rail Shipments from Stations West of Kankakee Stations
1935	723,000	Not Available	Not Available
1940	16,266,000	Not Available	Not Available
1956	26,210,000	24,647,211[B]	926,000[D]
1957	34,199,000	27,883,753[C]	5,362,000[E]

[A] Exhibit No. 3.

[B] 11 month period Dec. 15, 1955 to Nov. 11, 1956 projected on an annual basis at 56 pounds per bushel (Exhibit 19).

[C] 11 month period Dec. 15, 1956 to Nov. 11, 1957, projected on an annual basis at 56 pounds per bushel (Exhibit 19).

[D] 464 carloads of 2,000 bushels (Exhibit 4).

[E] 2,681 carloads of 2,000 bushels (R. 833).

The rail shipments during 1956 were almost entirely corn for export (R. 297) and more than 20 percent of the 5,362,000 bushels shipped by rail in 1957 were export shipments (R. 321) which moved on rates not involved here and which are 5 to 7 cents less than the competitive combination rates for which fourth section relief was sought (R. 306). In spite of the reduced rail rates, the barge route maintained an overwhelmingly dominant position in the transportation of corn from the Kankakee Belt Territory.

In addition to the movement figures under the competitive rates and the rate comparisons (Exhibit 10), the Commission had before it evidence of bids for corn for both rail and barge movement which showed that under the competitive conditions created by the reduced rail rates "the river bids are seen to be higher on the average than the rail bids" after adjustment to place them on a similar basis for comparison (R. 20).

The Commission also found that:

> "• • • The northern Illinois territory produces a surplus of corn. At one time, the corn moved over all-rail routes to eastern destinations. However, the development of commerce on the Illinois River about 20 years ago started a diversion of the all-rail movement to barge-rail routes extending from river ports by barge to Chicago, Ill., and thence by rail to eastern destinations. In 1935, 1940, and 1957, respectively, about 1.5, 19, and 59 million bushels of grain, including 0.7, 16, and 34 million bushels of corn, moved by barge from all Illinois River ports to Chicago. The bulk of the corn moved by barge originates at the 10 river ports which range from 4 to 36 highway-miles from the Belt origins, and is drawn from farms ranging up to 40 miles from the ports.
>
> "The primary business available to the New York Central at the origin points is grain, predominately corn, traffic. During 1954, 1955, and 1956, respectively 467, 729, and 615 carloads of grain, including 305, 533, and 464 carloads of corn originated thereat. Most of it was Commodity Credit Corporation corn which is usually shipped by rail for export, and is not subject to the same competitive forces as 'free' corn. In 1957, however, for the 6-, 8-, and 12-month periods ended June 30, August 31, and December 31, 1957, respectively, 1,915, 2,411, and 2,681 carloads of corn were originated at the Belt origins." (R. 13-14)

and further found that:

> "It is clear that the competitive situation which prevailed prior to the proposed rate between the all-rail and the barge-rail rates on corn from the northern Illinois territory to the East required an adjustment in the all-rail rates, and that such an adjustment requires fourth-section relief. (R. 27):

and, in referring to the effect of the competitive rail rates on the barge movement, found:

> "At the same time the 10 competitive river ports, notwithstanding their loss of traffic to the Belt, increased their shipments of corn to Chicago from 402,105 tons in the period December 15, 1955, to August 30, 1956, to 493,668 tons in the corresponding period the following year during which time the proposed rates were in effect. It is apparent that while corn grown adjacent to the Belt was attracted to the rails, that grown adjacent to the river remained with the barges. Thus, it is evident that the proposed rates are not lower than necessary to meet the barge competition." (R. 28)

The Commission also found that the competitive rail rates which were no lower than necessary to meet the barge competition permitted the country elevators served by the Kankakee Belt to resume operations that had been discontinued as a result of the virtual monopoly the barge route had obtained in the movement of corn from this area (R. 27).

2. Reasonably Compensatory Issue.

To show that the reduced rates are reasonably compensatory as required by Section 4, the applicants presented rate and earning comparisons and evidence of the operating and cost saving effect of the combination rates from the

stations west of Kankakee which caused the origin fourth section departures.

The mechanics of the rate application are shown by the following illustrations of a shipment from Moronts, a station west of Kankakee, milled in transit at Kankakee, and delivered to New York, N. Y. For the move from Moronts to Kankakee, a flat rate of 25 cents per hundred pounds is paid (R. 302). After milling in transit and reshipment to New York, the shipment qualifies for the combination rate of 59½ cents composed of the 5½ cent proportional rate to Kankakee and the 54 cent proportional rate from Kankakee to New York. The 34½ cent balance of the total 59½ cent charge due on the shipment is then paid. The corn lost in milling, called shrinkage, bears the 25 cent flat rate to Kankakee[8] (R. 580). The only function of the 5½ cent proportional rate is the determination of the through charges. It is not a separate charge. It has no independent application being but an integral part of the rate which applies on the through transportation from origin to ultimate destination (R. 25).

As "it is only by application of the through combination that the fourth section departures subject to this proceeding are created (R. 25)", applicants presented evidence to show that the through combination rate is reasonably compensatory. The compensativeness of the combination rate was demonstrated by rate and revenue comparisons as to which the Commission found:

> "During the 8-month period ended August 31, 1957, the corn and corn products movement of the General Foods Corporation yielded average revenues of $66.07 per car, 110,076 pounds, and $1.685 per car-mile for

[8] Since shrinkage is always experienced the net effect is to increase the inbound revenue.

39.21 miles, from Belt origins to Kankakee; $403.33 per car, 81,775 pounds, and 47.7 cents per car-mile for 845.7 miles, from Kankakee to eastern destinations; and $448.42 per car and 50.69 cents per car-mile for 884.7 miles, from Belt origins to eastern destinations. In the same period, the movement of Evans Milling Company yielded average revenues of $59.42 per car, 109,137 pounds, and $2.38 per car-mile for 24.95 miles, from Belt origins to Kankakee; and $407.38 per car, and 61.62 cents per car-mile from Belt origins to eastern destinations, including Ohio via Kankakee and Indianapolis. The proposed rates did not apply to Ohio destinations during the period, and, excluding such shipments, the car-mile earnings averaged 51.09 cents. For 1955, the average revenues of the New York Central were 40.015 cents per car-mile for its average haul of 236.58 miles. Between 1948 and 1956, inclusive, the average railroad revenue from corn ranged from 73 to 95 cents per short line car-mile. On the products of agriculture, earnings ranged from 42 to 48 cents and on selected grain and grain products (including corn and corn products) 57 to 71 cents. Distances on which the study producing these figures was based were not shown. Actual distances would produce lower earnings, but in many instances actual mileages are close to short-line mileages.

The proposed combinations from Belt origins to 18 representative destinations via Kankakee, and the reshipping rates from Chicago to eastern destinations, reflect averages of 14.4 and 13.1 percent, respectively, of the docket 28300 first-class rates. On ex-lake grain, from Buffalo and Oswego, N. Y., and Erie, Pa., to tidewater ports, applicants maintain export proportional rates which range from 6.3 to 9.5 percent of the same first-class rates. Also, from certain Belt origins to New York City and Boston, Mass., applicants maintain export rates on grain which are lower than the combination of proportionals over Kankakee. For example, from Dwight, the combination domestic rates are 59.5

and 61.5 cents to New York City and Boston, respectively, and the export rate is 54.5 cents to both ports." (R. 22-23).

The New York Central's evidence also showed that its revenues are increased and its expenses are reduced by reason of its handling of the traffic on the combination rates from the stations west of Kankakee, rather than handling the traffic from Chicago on the reshipping rates. As to this evidence, the Commission found:

> "The operating distance of the New York Central from Chicago to Kankakee is 75 miles compared with the weighted average distance of 38.3 miles from Belt points to Kankakee. The aggregate distances from Belt to Kankakee via truck to the river, thence barge to Chicago, and thence the New York Central to Kankakee exceeded by 133 to 797 percent the distance from Belt points to Kankakee, and to certain eastern destinations. The distances from Chicago via Kankakee exceeded by 3.73 to 20.61 percent the distances from Belt points via Kankakee. The line of another carrier, Illinois Central Railroad, from Chicago to Kankakee is more direct than that of the New York Central. The proposed rates apply from Belt points to eastern destinations via either Kankakee or Chicago.
>
> The switching of loaded and empty grain cars from and to terminal elevators at Chicago for the transportation of corn to Kankakee, Indianapolis, Paris, and Danville, by the New York Central is more complex than its handling of cars at Belt origins for movement to the same destinations. Switching charges absorbed by the New York Central on corn from Chicago to Kankakee during 2 months in 1956 averaged about 2 cents per 100 pounds. Avoidance of this cost item and the shorter weighted average distance from Belt points as compared to the distance from Chicago to Kankakee support the New York Central's contention that handling corn from the Belt points is less expensive than

from Chicago. Further support lies in the fact that no additional trains or power units were needed to handle the increased corn traffic from the Belt points, since the regular trains drop off the empties when westbound and pick up the loaded cars when eastbound. The exact extent to which handling is less expensive on the Belt than at Chicago is not shown.

The New York Central, for its haul from Chicago to Kankakee, assesses the local rate, but upon transit it is credited to the Chicago reshipping rate applicable via Kankakee, out of which it was required to absorb switching charges. At the proposed rate, it receives after transit the full amount of the proposed inbound proportional rate of 5.5 cents for its haul from Belt origins to Kankakee, and avoids the Chicago switching absorption. Thus by handling traffic at the proposed rate, its revenues are increased by 7.5 cents per 100 pounds over its previous handling, and its expenses are reduced in accordance with the reduction in miles from the 75 between Chicago and Kankakee to the lesser weighted average distance of 38.3 miles from Belt points to Kankakee." (R. 23-25)

3. Reasonableness of Rates from Intermediate Origins.

The record shows that the rates via the direct routes from the higher-rated intermediate origins, Kankakee and stations east thereof, have been in effect for more than 35 years, unchanged except for general increases or decreases in the rate level (R. 309). There was no challenge to the reasonableness of the rates from the higher-rated intermediate origins.

4. The Differing Competitive Situation at the Intermediate Origins.

The only protestant before the Commission from intermediate origins via the direct routes over which fourth section departures occur was the Indiana Farm Bureau

Cooperative Association, which is not an appellant. The record showed and the Commission found that barge competition existed from the stations west of Kankakee. There is no barge competition from the intermediate origins (R. 310). As to the contention of that protestant, the Commission found:

> "Among its 150 to 200 Indiana shipping points are stations intermediate from Kankakee to eastern destinations on the New York Central from which the rates on milled-in-transit corn to those destinations are as much as 10 cents higher than the proposed rates. Combination rates on corn via barge to Chicago thence by rail to these destinations are lower than the local rates from intermediate Indiana destinations and are applicable over Kankakee as well as Chicago. Shifting some of the Belt corn from barge to rail, which is the effect of the proposed rates, would not alter the present competitive relationship at eastern markets between it and Indiana corn." (R. 18).

5. Board of Trade Presentation.

Appellant Board of Trade of the City of Chicago (Board of Trade) presented evidence to show its interest in rates on grain, including corn and corn products, which showed that the receipts of all grain at the Chicago market increased from 85,791,000 bushels in 1935 to 227,823,000 bushels in 1957, and that receipts of corn increased from 27,841,000 bushels in 1935 to 99,396,000 bushels in 1957 (Exhibit 44). The principal burden of the Board of Trade's evidence was to show that the combination rates via Kankakee to the east were lower than necessary to meet competition of the circuitous barge-rail route via Chicago. (R. 805-812, Exhibits 50-55). As stated by the Commission, the Board of Trade raised "certain issues, principally discrimination against whole corn by the milling in transit

limitation; discrimination against Chicago by the proposed rate-combination applying over Kankakee when prior thereto rates to the East were made over Chicago; undue preference to the processors of corn by the limitation in the application of the proposed rate to commodities shipped by these processors; and unreasonable routes on the proposed rate combination by the restrictive routes which apply over Kankakee in movements to eastern destinations." (R. 26). While the rail applicants deny that the Kankakee combination rates prejudice or discriminate against the Board of Trade, they made no effort to meet or disprove those contentions of the Board of Trade which stemmed from its interest in the rate structure and were irrelevant to the much narrower issues of the fourth section application for exemption from the requirements of Section 4 via direct routes which do not operate through Chicago. As to the collateral arguments made by the Board of Trade, the Commission held that:

> "* * * these issues do not directly deal with the fourth section principles here involved, but are properly matters which may be raised in investigation or complaint proceedings. However, since the proposed rates are effective over Chicago, that point has the same stature as all other corn processing points in official territory in their application. Moreover, the routes over Kankakee are the same as they were for many years prior to the establishment of the proposed rates, and while limited in their scope as compared to making the inbound rate break on Chicago, there is no indication of undue damage to Chicago." (R. 27).

6. Mechling Presentation.

As was the case of most of the protestants at the hearing, Appellant A. L. Mechling Barge Lines, Inc. (Mechling) opposed the granting of the fourth section application on

the grounds that the rates were lower than necessary to meet the competition of the barge-rail route. Additionally, that appellant argued issues under other sections of the Act that were not presented by the railroads' fourth section application which was the only matter set for hearing (R. 92-93).

At the hearing Mechling, through cross-examination of the railroads' Witness Tascik, attempted to develop facts which it claimed showed a violation of Section 3(4) of the Act through a difference between the Chicago proportional or reshipping rates that apply on corn brought to Chicago by barge and the divisions of the Kankakee reshipping rate via circuitous routes through Chicago (R. 340). Objection to this line of cross-examination was sustained by the hearing examiner on the ground that the inquiry was not pertinent to the issues presented at the hearing (R. 343). Mechling made no effort to develop this point through its own witnesses.

Witness McWilliams, called by protestants before the Commission which are not appellants here[9] presented a cost calculation based on unsifted averages without adjustment for actual operations and without any study of the operation along the Kankakee Belt Line (R. 606). The witness calculated the out-of-pocket and fully distributed rail cost of transporting corn from the stations west of Kankakee to Kankakee as being 8.56 and 13.12 cents per hundred pounds (R. 601). While the Commission recited those figures (R. 25, 26), it did not find that they reflected the New York Central's cost to Kankakee. Applicant did not rebut the average calculations for the reason that the

[9] Witness McWilliams was called by the attorney for Cargill, Inc., Illinois Grain Corporation and Indiana Farm Bureau Cooperative (R. 292, 590).

compensatory issue in the fourth section proceeding, as they understood it, related to the compensativeness of the aggregate through charge from origin to destination via the direct routes. Mechling, relying on the averages submitted by the witness for other protestants argued that the 5½ cent rate was noncompensatory. It also argued that a comparison of those averages with Mechling's own costs to Chicago showed that Mechling was the low cost carrier as contrasted with the railroad and that the handling of traffic on a noncompensatory rate (which fact was not proven or found by the Commission) constituted destructive competition (R. 26). This argument was made even though the barge movement of corn continued to increase in spite of the competitive rail rates (Exhibit 3).

C. The District Court Proceeding.

All of the questions presented here were presented to the statutory three judge District Court which dismissed the complaint holding that:

> "Due regard was given to the policy and statutory scheme of the Act within the limits afforded by Section 4 and under that Section the Commission is not required to make specific ultimate findings that a rate is lawful and not discriminatory. The water carrier and other plaintiffs have failed to utilize the provisions of sections of the Act which afford the Commission the proper scope for such determination. (Citations omitted)" (R. 77)

and that the commission's

> "* * * order . . . was within the statutory power of the Commission, that it is supported by findings and conclusions based on substantial evidence, and that no prejudicial error occurred in the hearings before the Examiner and Commission." (R. 80)

IV.

ARGUMENT.

A. Summary.

(1) The Commission finding that the rates are not lower than necessary to meet competition is based on and required by the evidence. Thirty-one of the 35 witnesses who testified at the proceeding testified as to the competitive issue. The Commission's discussion of the contentions of the parties in respect to the competitive issue is thorough and detailed. (R. 13-22; 27-28). It is clear therefrom that the Commission fairly considered the entire record in making its ultimate finding on the competitive issue. While the Commission must consider all of the evidence, its finding of facts, if supported by evidence, must be sustained. *Board of Trade of Kansas City* v. *United States*, 314 U. S. 534, 546 (1942). Here the Commission's finding is required by the evidence.

(2) The correctness of the Commission's basic determination of the compensatory issue on consideration of the through or aggregate charges from origins west of Kankakee to destinations in the East is clear from the language of Section 4 of the Act and the cases cited by the District Court. The statute plainly refers to "greater compensation in the aggregate" and "any charge to or from the more distant point." There was no challenge as to the compensativeness of the through charges from origin to destination. The Commission found that the through charges involved were on a higher level than export rates on corn from the same origins to New York, and on a higher level than other grain rates with which they were compared, (R. 23); and further found that by handling traffic on the proposed through rates New York Central's revenues are increased by 7.5 cents per hundred pounds and its expenses

are reduced by reason of the less expensive handling of corn from stations west of Kankakee than from Chicago (R. 24). The Commission also found that the rates are not lower than necessary to meet the barge competition (R. 24) and finally found that, "The rate and revenue comparisons and cost-saving evidence submitted by the New York Central and its supporters established the compensativeness of the proposed rates." (R. 28). These findings, based on substantial evidence, fully meet the time-honored definition of a reasonably compensatory rate set forth in *Transcontinental Cases of 1922*, 74 I.C.C. 48, 71, which was quoted by the Court below. There is no basis for the assertion that the rates are non-compensatory as required by Section 4 or that the competitive portion of the rate is subsidized by a non-competitive portion of the rate. The Commission specifically found to the contrary. (R. 23-25).

(3) That the Commission is not required to make a final determination in respect to the lawfulness of the rates under other sections of the Act in a hearing limited, as this one was, to the railroads' fourth section application was decided by this Court in *United States* v. *Merchants & Manufacturers Traffic Association*, 242 U.S. 178 (1916). See also *Scatrain Lines, Inc.* v. *United States*, 168 F. Supp. 819 (N.D.N.Y. 1958); *Koppers Company* v. *United States*, 132 F. Supp. 159 (W.D. Pa., 1955) and *Florida Citrus Commission* v. *United States*, 144 F. Supp. 517, 526 (N.D. Fla., 1956).

Intermountain Rate Cases, 234 U.S. 476 (1914), cited by appellants and decided prior to *United States* v. *Merchants & Manufacturers Traffic Assn.*, *supra*, does not deal with the question presented here. In that case this Court interpreted Section 4, as amended in 1910, held that it was constitutional, and held that orders of the Commission entered thereunder were reviewable. This Court's discussion of "The Meaning of the Statute" at pages 480-486, makes it

clear that its reference to "the preference and discrimination clauses of the second and third section" of the Act was to discrimination against or prejudice to intermediate short haul shippers who would be adversely affected by lower long haul rates. At pages 482-483 of that opinion, this Court pointed out "* * * that where within the purview of the fourth section it had lawfully resulted that the lesser rate was charged for a longer than for a shorter haul, such exaction being authorized could not be preference or discrimination and therefore illegal." Thus, while that case requires the Commission to find that a special case exists to excuse what otherwise would be discrimination or prejudice to the intermediate short haul shippers, it does not require the Commission to make a final and ultimate determination of the lawfulness of the rates under other sections of the Act.

Neither the Commission nor the Court below held that the Commission is excused from taking cognizance of the National Transportation Policy and applying the Act as a whole as required by *American Trucking Assns., Inc.* v. *United States*, 355 U. S. 141 (1957). The Commission's report is replete with discussion of the evidence and contentions of the parties and includes the finding that in this instance the railroad's efforts to secure traffic do not amount to a destructive competitive practice (R. 26). However, the requirement that the Commission administer the Act consistent with the National Transportation Policy does not demand that the Commission modify its procedures and make specific ultimate findings under sections of the Act other than those under which the proceeding is held. The Commission did not change its procedures in this case. The Commission reports cited by appellants do not establish the proposition that the Commission must determine all issues in a fourth section hearing. Most of the cases cited

by the appellants were (a) not fourth section proceedings, or (b) general investigation proceedings under Section 15(7) of the Act where the lawfulness of the rates is at issue, or (c) cases in which the relief sought was granted, or (d) where the rates did not meet the requirements of Section 4.

(4) The Commission's report and order are in full accord with the National Transportation Policy. The Commission found that the rates are not lower than necessary to meet competition; that the barge movement of corn increased; that the New York Central's revenues were increased and its expenses reduced in contrast to the situation in the prior handling of the traffic via circuitous routes through Chicago. The Commission found that the rates do not constitute a destructive competitive practice, which conclusion is consistent with the lack of probative evidence of any inherent cost advantage of the barge-rail route over the competitive all-rail route.

B. Introduction.

Before discussing the questions presented by appellants, it is necessary that their interests be placed properly in perspective through an examination of their relative position prior to and subsequent to the publication of the involved rate. Before the publication of the rate, corn milled in transit at Kankakee originating at a point near the Kankakee Belt had to move through Chicago an average distance of 168.8 miles[10] instead of direct to Kankakee an average distance of 38.3 miles (R. 305). Then the corn had to move over the circuitous route from origin to Chicago

[10] Composed of the average river distance from Illinois River ports competitive with the Kankakee Belt to Chicago and the 75 mile rail haul from Chicago to Kankakee (Exhibit 39).

via barge because of the rate advantage of the combination of barge and rail rates to eastern destinations. This situation had the net results of bestowing virtual monopolies on both the Board of Trade and Mechling. Understandably, both appellants wish the restoration of these monopolies.

The publication of the involved rate had the net effect of permitting some corn and its products to move directly through Kankakee instead of over the much longer route via Chicago. Obviously, appellants were not in a position to object to the granting of fourth section relief on the grounds that their respective monopolies would be destroyed. Further, since neither of them has any interest in the higher rates applying from intermediate origins via the direct routes for whose benefit Section 4 had principally been enacted, they adopt the position that the hearing which had been set for the sole purpose of determining whether the applicant had met the criteria of Section 4. was, in fact, a general rate investigation which the Commission had declined to initiate under Section 15(7) of the Act. As will be demonstrated in greater detail below, Mechling even went so far as to attempt to pursue the argument that a violation of Section 3(4) of the Act existed even though the existence of such an alleged violation would be entirely unrelated to the rate publication involved and would not be abated through the vacation of the fourth section order involved.

Only two of the questions presented by these appeals deal with Section 4 of the Act, the provision of law under which the proceeding before the Commission was heard.

One question dealing with Section 4, raised only by Mechling, is:

> (A) Whether the Commission erred in concluding and finding that the rates in question are lower than

necessary to meet competition (Mechling Question 5, Brief, p. 5, 37-41).

It is submitted that the Commission finding is correct and is based on and fully required by substantial evidence of record. The other question dealing with Section 4, also raised only by Mechling, is:

> (B) Whether the Commission erred as a matter of law in determining the compensatory character of the rates within the meaning of Section 4 on consideration of the through charges that result from the combination of the proportional rates to and from Kankakee (Mechling Brief Question 4, Brief, pp. 4, 19-27).

The United States has confessed error. However, in its brief, it agrees with and supports the correctness of the Commission's construction of Section 4, stating that Section 4 prohibits the granting of relief "only if the total rate for a *longer* haul is not compensatory" (Brief, pp. 31-32). It is submitted that the Commission correctly construed Section 4 in the only logically permissible way.

All other questions bear on issues under provisions of the Interstate Commerce Act other than the one under which the Commission hearing was held. It is submitted that those questions fairly fall into two groups.

> (A) Is the Interstate Commerce Commission required to finally decide issues as to lawfulness of rates under Sections 1(5), 3(1), and 3(4) of the Interstate Commerce Act in a proceeding held solely on an application for relief via direct routes only from the long and short haul prohibition of Section 4 of the Act. (Board of Trade Question Brief p. 2, Mechling Brief, p. 19; United States Questions 1 and 3, Brief, p. 2)

As to this question, appellee submits that the Commission was not required to convert a hearing on the narrow issues

of a fourth section application limited to relief via direct routes only into a general investigation of the lawfulness of rates under all sections of the Act via circuitous as well as direct routes.

1. The Section 1(5) Argument.

Mechling argues that the proportional rate to Kankakee is noncompensatory and therefore unlawful in violation of Section 1(5) of the Act (Mechling Brief, pp. 8-9, 27). The United States also argues that the proportional rate is noncompensatory (United States Brief, pp. 30-31).

The Commission did not find, as stated by Mechling, that the proportional rate is noncompensatory (Brief, p. 20); nor did the New York Central concede, as stated in the brief of the United States (Brief, pp. 30-31), that the 5½ cent proportional rate was less than its costs[11]. What the Commission did was recite the fact that a cost calculation was submitted and what that calculation showed, as follows:

> "The protestants submitted a study of the system average costs of the New York Central and the territorial average costs of the eastern district railroads. On the average 55 ton load, the out-of-pocket costs of the New York Central and the eastern district railroads are 8.56 and 8.57 cents per 100 pounds, respectively

[11] The brief of the United States states that it was undisputed that the 5½ cent rate did not cover the rail carriers' out-of-pocket cost (p. 17) and the rail carriers' adjustment of the out-of-pocket cost computation indicated that the cost exceeded the 5½ cent rate by almost 1.5 cents (p. 30). That brief relies on a statement in the Examiner's report which is not included in the Commission report (R. 48). While the railroad applicants at all times argued that only the compensativeness of the through charges was at issue, an *arguendo* discussion in their brief showed numerous overstatements in the cost calculations. The Examiner's reference to a 6.9 cent cost reflected but one of the adjustments that would be necessary to refine the costs. New York Central has never conceded that the 5½ cent proportional rate is noncompensatory. It is its opinion that it is compensatory.

> for the weighted average distance of 38.3 miles. On minimum loads of 50 tons and for the simple average distance of 46.4 miles, the out-of-pocket costs range up to 9.66 cents per 100 pounds." (footnotes omitted, R. 25).

While the Commission recited the contention of one of the protestants' cost witnesses, it did not find that the calculation was correct. The witness admitted that his calculations were based on average figures (R. 603, 607) and that he had made no study of transportation conditions on the Kankakee Belt line (R. 606). While the hearing examiner found the 5½ cent proportional rate to be noncompensatory on the basis of those unsifted average costs (R. 48), the Commission omitted the Examiner's cost conclusion. Logically, this can only mean that the Commission was of the opinion that that evidence, the only evidence dealing with the compensativeness of the 5½ cent rate, was insufficient to show that it was not compensatory.

2. The Section 3(1) Argument.

Appellant Board of Trade states that "the effect of the milling in transit requirement, for all practical purposes, was to prevent Chicago grain merchants and elevator operators from buying whole corn off the Kankakee Belt (Brief p. 6)". This appears to be the principal factual basis for its contention that the rates violate Section 3(1). The argument seems to be that the milling in transit requirement unduly prefers millers of corn located at Kankakee or elsewhere, to the undue prejudice and damage of the Board of Trade and its members.

Appellant Mechling also seizes on this argument in its effort to defeat the fourth section order (Brief, p. 11). although elimination of the milling in transit restriction on the rate thereby making it more generally applicable

would seem to be inconsistent with Mechling's effort to conserve the virtual barge monopoly in the movement of corn from the Kankakee Belt area. Mechling's argument on an issue in which it has no real interest is indicative of the way contentions extraneous to the fourth section issues are presented to overshadow the fourth section issues decided by the Commission.

Appellants and the United States argue that in addition to making a final determination on the fourth section issues, the Commission was required to make a final determination of the Section 3(1) issue of the Board of Trade in respect to claimed prejudice to the Board of Trade and its members at Chicago.

Chicago is not on the direct routes from the Kankakee Belt origins to the East (R. 150). Section 4 of the Act, as amended July 11, 1957, limits the prohibition of the long and short haul clause to the direct routes only (71 Stat. 292). The Commission's fourth section order is limited to the direct routes only (R. 29). Certainly the Commission in entering a fourth section order via direct routes should not be required to finally determine the lawfulness of rates via numerous circuitous routes under other sections of the Act[12] in hearing limited to the fourth section via direct routes.

The Commission did not decide the Board of Trade's contention under Section 3(1) of the Act stating "that these issues do not directly deal with the fourth section issues involved, but are properly matters that may be raised in investigation or complaint proceedings (R. 27).

[12] For example, Exhibit 59 shows 15 routes from the Kankakee Belt stations to Pittsburgh, Pa. By definition there is but one short route and at least 14 circuitous routes. Multiply this by the number of destinations and the number of circuitous routes become unwieldly.

The railroads did not present evidence on this issue which is extraneous to section four but are of the opinion that the Chicago Board of Trade is not "unduly prejudiced" in violation of Section 3(1) of the Act. The Commission's comment that "there is no indication of undue damage to Chicago" (R. 27) reinforces this opinion. Indeed it is difficult to conceive how the competitive rail rates could unduly prejudice, *i.e.*, unduly damage, the Board of Trade. That is, if, as the Commission found, the reduced all-rail rate was no more desirable than the barge-rail rate, it necessarily follows that shippers on the all-rail route are at best competitively equal with shippers on the barge-rail route. Thus in the instant case, the granting of relief under Section 4 with requisite findings would have necessarily not created undue preference or prejudice.

3. The Section 3(4) Argument.

Appellant Mechling (Brief pp. 12, 32) and the United States (Brief pp. 37-39), claiming that there is reason to believe that the rate structure contains a violation of Section 3(4) of the Act argue that the Commission should have permitted a full inquiry into that allegation and was required to determine whether or not such a violation exists before it could enter its order under Section 4.

The allegation that there is, or may be, a violation of Section 3(4) is based on answers given on cross-examination by a railroad witness in respect to divisions of the Kankakee proportional rate. Appellant Mechling argues that the answers on cross-examination indicated that if the New York Central performed transportation on the reshipping rate from Kankakee to Chicago and the corn and corn products were forwarded from Chicago to New York by another carrier, the New York Central would receive 13

cents of the reshipping rate and the other carrier would receive the balance of the reshipping rate, or 41 cents.[13] It is the apparent difference between that balance of 41 cents received by a New York Central connection at Chicago and the 54 cent Chicago proportional reshipping rate to New York that is the basis for the argument that there may be a violation of Section 3(4).

In argument of this question Mechling reaches for an issue patently unrelated to the fourth section issue before the Commission. There was no change in the reshipping rates from either Kankakee or Chicago to Eastern destinations (R. 300). The Kankakee reshipping rate has long applied via routes through Chicago just as the Chicago reshipping rates have applied over routes through Kankakee (R. 320). Cancellation of the fourth section order under review would not change that situation. The only effect would be to prevent the movement of corn from the stations west of Kankakee unless the railroads elected to reduce the rates from Kankakee and other intermediate origins on the direct routes which do not apply through Chicago. In either event the Kankakee reshipping rate would continue to apply via Chicago and would be divided between the railroads that deliver the corn to Chicago and the railroads that forward it from Chicago.

If there be a violation of Section 3(4), which these appellees deny, it existed prior to the establishment of the competitive combination rates; it is not caused by those rates; nor is it caused by the fourth section order; and it would not in any circumstances be eliminated by cancellation of the fourth section order. The Commission in

[13] In its brief Mechling refers to a reshipping rate of 49.5 cents from both Kankakee and Chicago to New York (p. 12), at the time of the hearing those reshipping rates were 54 cents (R. 303).

deciding the issues under Section 4 was not required to make a determination of issues dealing with an alleged violation of the rate structure that is independent of the fourth section relief granted.

The other question raised by the appeals which does not directly deal with Section 4 is:

> (B) Whether the Interstate Commerce Commission's finding that the rates do not constitute a destructive competitive practice is supported by the evidence and is consistent with the National Transportation Policy (United States Question 2, Brief, pp. 2, 30-37; Mechling Brief, p. 19).

The Commission found that: the rates "are not lower than necessary to meet competition" (R. 28); that the barge movement of corn from the competitive ports increased after the reduced rail rates became effective (R. 28); that the evidence showed that the result of the rate was to increase the New York Central's revenues over and reduce its expenses under its revenue and expenses on the prior handling of the traffic from Chicago (R. 24). Appellees submit that these findings which are supported by evidence fully disprove the contention that the Commission failed to give due consideration to the National Transportation Policy.

C. Reply to Arguments in Respect to Questions Under Section 4 of the Act.

1. The Commission finding that the rates are no lower than necessary to meet competition is based on and required by the evidence.

Mechling argues that the rates are lower than necessary to meet competition. Essentially this is an assertion that the Commission erred as a matter of fact (Brief pp. 37-41).

The Commission recognized the requirement of Section 4 that the rates may not be lower than necessary to meet competition (R. 27) thus the Commission was well aware of this principle as stated in the cases cited by Mechling.[14]

The record before the Commission included 852 pages of transcript taken at the hearing. Thirty-five witnesses testified and were cross-examined, thirty-one of which testified in respect to the competitive issue.[15] It may fairly be characterized as having dominated the hearing with Appellant Mechling and others who were interested in preserving the barge monopoly on the transportation of corn from the Kankakee Belt area contending that the combination rates to the east based on the 5½ cent proportional rate should be as much as 9 to 13 cents higher (R. 21, 22). Of course, those contentions are absurd in the face of the movement figures which showed that the barge route remained the overwhelmingly dominant factor in the transportation of corn under the competitive conditions created by the rates contended to be lower than necessary to meet competition (R. 28).

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[14] *Skinner & Eddy Corp.* v. *U. S.*, 249 U.S. 557, 568 (1919); *Citrus Fruit from Florida to North Atlantic Ports*, 266 I.C.C. 627, 636-638 (1946); and *Pacific Coast Fourth Section Applications*, 264 I.C.C. 36 (1945) cited at page 37 of Mechling Brief.

[15] The witnesses that testified on the competitive issue and the reference to the pages of the record at which their testimony appears are: Tascik (R. 293-396); Gibbons (R. 442-461); Cahill (R. 462-481); Hoyle (R. 482-487); Nader (R. 489-498); Schier (R. 501-514); Geekie (R. 515-520); Graves (R. 522-557); Schaller (R. 557-577); Wilson (R. 608-616); Mechling (R. 617-640); Scott (R. 642-652); Funk (R. 653-657); Antrim (R. 660-664); Tallyn (R. 667-672); Herron (R. 673-678); McGowan (R. 679-680); Thomas (R. 681-683); Gage (R. 684-685); Brehman (R. 689-691); Gally (R. 693-697); Treasure (R. 699-706); Mrs. Bookwalter (R. 706-713); Farlow (R. 713-715); Dewey (R. 717-723); Cunningham (R. 723-742); Adams (R. 744-751); McClintock (R. 752-770); Dawse (R. 771-774); Springrose (R. 775-793); Chartrand (R. 794-820).

The case was thoroughly briefed by all parties and was orally argued before Division 2 of the Commission which unanimously found the rates to be no lower than necessary to meet competition. The Commission discussion of the evidence and contentions of the parties in respect to the competitive issue is thorough and detailed (R. 13-22; 27-28). It is clear therefrom that the Commission fairly considered the entire record in making its ultimate finding on that issue.

The Commission is the trier of facts. While it is true that the Commission's findings must be supported by the evidence before it, it is the Commission's function to weigh that evidence and the Commission's findings of fact must be sustained if supported by any substantial evidence. *U.S.* v. *Pan America Corp.*, 304 U.S. 156 (1938); *Alton Railroad Company* v. *United States*, 315 U.S. 15, 23 (1942); *United States* v. *Pierce Auto Lines*, 327 U.S. 515 (1946). The Commission is the expert body designated by Congress to determine such technical and complicated questions of fact. *Board of Trade of Kansas City* v. *United States*, 314 U.S. 534, 546 (1942). As the tribunal appointed by law, and informed by experience, the Commission here did find upon consideration, of all evidence of record that the rates are not lower than necessary to meet competition. The argument of Mechling on this issue, which is a contention that the Commission erred as to the weight and significance that should be placed on certain of the facts of record, totally fails to show that the Commission erred.

2. The Commission Correctly Determined the Compensativeness of the Rates Within the Meaning of Section 4 on Consideration of the Through Charges.

Appellant Mechling makes no argument that the Commission erred in finding the through charges from the ori-

gins west of Kankakee to be compensatory but charges that the Commission erred in not confining its considerations on the compensatory issue under Section 4 of the Act to the 5½ cent proportional rate to Kankakee (Mechling Brief, pp. 20-26). The only case cited by Mechling in support of this argument is *Transcontinental Cases of 1922*, 741 I.C.C. 48, 70-71 (1922)[16] in which the Commission defined a reasonably compensatory rate, but that case does not deal with the point raised by appellant.

The 5½ cent proportional rate to Kankakee is not a rate in and of itself. It has no independent existence and is never charged to a shipper for moving corn to Kankakee as on all such shipments the full local rate is assessed (R. 580). Its only function is in the determination of the through charges from origin to ultimate destination (R. 25).

The proportional rate to Kankakee does not create fourth section departures. It is only when the proportional rate to Kankakee is combined with the reshipping rates from Kankakee to destination to produce a lower charge than the rate from Kankakee that a departure is created (See Table P. 6, *supra*). The only relief sought by the railroads and granted by the Commission was the authority to maintain lower charges from west of Kankakee to destinations east thereof than apply from Kankakee and other intermediate origins to the same destinations (R. 29, 140).

That the Commission correctly determined the compensative issue on consideration of the through or aggregate charges is clear from the language of Section 4 which in pertinent part provides:

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[16] The district court quoted the *Transcontinental Cases* definition of a reasonably compensatory rate under Section 4 and held that Commission's findings met the rule of that case (R. 79).

"It shall be unlawful for any common carrier subject to this part or part III to charge * * * *any greater compensation in the aggregate* for the transportation * * * of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, * * * *Provided*, That upon application to the Commission and after investigation, such carrier, in special cases, may be authorized by the Commission to charge less for longer than for shorter distances for the transportation of * * * property * * * but in exercising the authority conferred upon it in this proviso, the Commission shall not permit the establishment of *any charge to or from the more distant point* that is not reasonably compensatory for the service performed * * *". (Emphasis supplied)

A plain reading of the statute which refers to "any greater compensation in the aggregate" and "any charge to or from the more distant point" is convincing that, as stated in the brief of the United States (p. 32), the Commission construed the section in the only logically permissible way. It was so construed by the Commission in *Imperial Coal Co.* v. *Pittsburgh & L.E. R. Co.*, 2 I.C.C. 436, 445 (1889), and *Sheldon Axle and Spring Co.* v. *L.V. R.R. Co.*, 53 I.C.C. 43, 45 (1919) and was so construed by the Court below (R. 78).

Mechling admits that the phrase "any greater compensation in the aggregate" does refer to the combination rates but makes the strained argument that the phrase "any charge to or from the more distant point" as used in the same paragraph has an entirely different meaning (Mechling Brief, pp. 21-22). That distinction is sheer sophistry. The fourth section deals with a specific form of discrimination which is prohibited unless the Commission excuses the carriers from its requirement. It is inconceivable that Con-

gress intended different meanings to these similar and parallel phrases in the same section of the Act.

The distinction made by Mechling is based on form rather than substance. As noted by the Commission, the rates from each origin to each ultimate destination could be filed as single-factor rates (R. 25). The through charges would remain the same and the compensatory issue under Section 4 would necessarily be decided on the compensativeness of the through charge to the more distant point. A holding that the standard under Section 4 is different merely because the total charge for the longer haul is composed of proportional factors (which have no independent existence) would not only strain the language of the fourth section but would be based on the shallow ground of form rather than meaningful substance.

D. Reply to Arguments in Respect to Questions Under Provisions of the Act Other Than Section 4.

1. The Commission is not Required to Finally Decide Issues as to the Lawfulness of Rates Under Sections 1(5), 3(1), and 3(4) of the Act in a Proceeding Held Solely on an Application for Relief from the Long and Short Haul Prohibition of Section 4 via Direct Routes Only.

The issues in the fourth section application proceeding before the Commission are solely those raised by the application of the railroads being whether there is a "special case" and whether the rates are "reasonably compensatory". *Seatrain Lines, Inc.* v. *United States,* 168 F. Supp. 819 (1958). As noted *supra,* p. 8, the hearing before the Commission was solely on the railroads' Fourth Section Application No. 33955. The application, the basis for the Commission hearing is analogous to complaints which form the basis for Commission hearings under Section 13(1) of the Act and the law and practice is well settled that the only issues

that can be considered in a hearing and investigation on complaint are those raised by the Complaint. *W. H. Mason Lumber Co.* v. *Baltimore & O. R. Co.*, 279 I.C.C. 210, 211 (1950); *American Iron & Machine Works* v. *Akron C. & Y. R. Co.*, 296 I.C.C. 737, 742 (1955); *Shaw Warehouse Co.* v. *Southern Ry. Co.*, 308 I.C.C. 609, 612 (1959). The asserted violations of other sections of the Interstate Commerce Act "do not directly deal with the fourth-section principles here involved, but are properly matters which can be raised in investigation or complaint proceedings (R. 27)." Neither Mechling nor the Board of Trade filed complaints under Section 13(1) of the Act and the Commission did not institute an investigation under Section 15(7)[17] of the Act. The Commission order assailed here specifically states that the Commission did not pass on the lawfulness of the rates filed under the permissive authority granted under the order. The order provides that:

> "The Commission does not hereby approve any rates filed under this authority, all such rates being subject to complaint, investigation, and correction if in conflict with any provision of the Interstate Commerce Act."

This provision is contained in all fourth section orders entered by the Commission consistent with the fact that only fourth section issues are determined in a hearing on requested relief from the long and short haul prohibition of Section 4(1) of the Act.

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[17] The Commission has discretionary power to institute a general investigation into the lawfulness of rate changes under Section 15(7) if it has reason to believe that the rates are unlawful. Both Mechling and the Board of Trade requested the Commission to institute such an investigation, but their petitions were not granted (R. 87, 90). The Commission is also empowered to institute an investigation under Section 15(1) of the Act which it did not do.

The Commission's action in confining its determinations to the issues raised by the fourth section application is fully supported by *United States* v. *Merchants & M. Traffic Association*, 242 U.S. 178 (1916). That opinion contains one of the most significant discussions concerning the nature of fourth section proceedings. In that case the Commission had granted extensive fourth section authority over a wide territory involving numerous destinations and intermediate points. Hearings were held. Thereafter, certain intermediate cities contended that the order was invalid because they had not been heard in the proceedings in which the orders had been entered. This Court stated (at page 188):

> "For the order is permissive merely. The carrier is the only necessary party to the proceeding under § 4. The Commission represents the public. While it is proper and customary for communities or shippers interested to participate in hearings held, there is no provision for notice to them. They are not bound by the order entered; at least in the absence of such participation. And if the rates made by tariffs filed under the authority granted seem to them unreasonable, or unjustly discriminatory, §§ 13 and 15 afford ample remedy."

In pointing out that the plaintiffs there ought to have applied for redress under Section 13 instead of seeking a hearing on claimed discrimination against shippers and communities under Section 4, this Court declared (at page 188):

> "They mistook their remedy. To permit communities or shippers to seek redress for such grievances in the courts would invade and often nullify the administrative authority vested in the Commission; and, as this case illustrates, the attempt of the court to remove some alleged unjust discriminations might result in creating infinitely more."

The *Merchants and Manufacturers* case clearly recognizes the distinction between (1) the determination of the issues on a fourth section application and (2) the determination of the lawfulness of the rates filed in conformance with the order. Applicants' distinction of that case on the ground that plaintiffs there were not parties to the Commission proceeding oversimplifies and misses the point of Mr. Justice Brandeis's holding (Board of Trade Brief, pp. 31-33; Mechling Brief p. 36; United States Brief p. 26).

That competing carriers likewise cannot raise the issue of discrimination in a hearing on the railroads' fourth section application is clear from *Seatrain Lines, Inc.* v. *United States, supra.* There a common carrier by water under Part III of the Interstate Commerce Act, a competitor of the railroad fourth section applicants, brought suit to set aside a fourth section order. Among the grounds urged by plaintiff water carrier was that its competitive position was adversely affected by the fourth section order which it alleged unduly and unjustly discriminated against it. The Court held:

> "The only questions presented for investigation by the Commission under Section 4 are whether there is a 'special case' and whether the proposed rates are 'reasonably compensatory'."
>
> * * * *
>
> "However, Section 4 does not contemplate that there shall be a determination in a Section 4 proceeding as to whether the rates charged are unduly discriminatory against a competing water carrier. This question must be raised by proceedings under Sections 13 and 15 of the Interstate Commerce Act. In such proceedings a hearing must be held at which all parties affected, carriers, shippers and communities, can be heard and their respective interests appropriately weighed and balanced by the Commission." (p. 824)

Appellants argue that the *Seatrain* holding is erroneous *dicta* (Board of Trade Brief pp. 34-35; Mechling Brief, p. 36; United States Brief pp. 27-28). However, as in the *Merchants and Manufacturers* case, the Court's ruling in *Seatrain* is based on the distinction between determination of issues in the granting of a permissive fourth section order which binds no one, and the determination of the lawfulness of rates under other sections of the Act.

See also *Koppers Company* v. *United States*, 132 F. Supp. 159 (1955), and *Florida Citrus Commission* v. *United States*, 144 F. Supp. 517 (1956). The *Koppers* case was a suit to enjoin an order of the Interstate Commerce Commission which was dismissed for the reason that plaintiffs' remedy was under Sections 13 and 15 of the Act. The Court said:

> "In the case of a permissive order, the carrier is the only necessary party to the proceeding. The Commission represents the public. While it is proper and customary for shippers interested to participate in hearings, there exists no provision for notice to them. They are not bound by the order entered and the tariffs filed. If the rates made by tariffs filed under the authority granted seem to them unreasonable, or unjustly discriminatory, Sections 13 and 15 afford ample remedy. To permit shippers to seek redress for such grievances in the courts would invade and often nullify the administrative authority vested in the Commission. The attempt of the court to remove some alleged unjust discrimination might result in creating more. *United States* v. *Merchants' & Manufacturers' Traffic Association*, 1916, 242 U.S. 178; 37 S. Ct. 24; 61 L. Ed. 233.
>
> "Sections 13 and 15 of the Act speak with clarity, and explicitly specify the procedure which complainants must pursue before the Commission in order to seek redress of grievances." (p. 162)

Appellant Board of Trade argues that the *Kopper* and *Florida Citrus* cases, which were also cited by the Court below, are not pertinent to the issue of whether the Commission is required to make a final determination of the lawfulness of rates under all sections of the Act in the proceeding in which it entered the permissive fourth section order (Brief p. 31). However, both the *Koppers* and *Florida Citrus* cases follow the *Merchants' & Manufacturers* case and distinguish between the determination of lawfulness of rates and the granting of a permissive order. In the *Koppers* case, the Commission order permitted greater increases in coal rates on which the plaintiff received coal than the increase in the rates on coal to competing receivers. The plaintiff which had been a party to the Commission proceeding contended that this was unreasonable, discriminatory, and unduly prejudicial (132 F. Supp. 159 at 161). Similarly, the *Florida Citrus* case distinguishes between the issuance of a permissive order which can be done without determination of lawfulness of rates and the determination of lawfulness of rates.

Appellants rely on *Intermountain Rate Cases,* 234 U.S. 476 (1914), in support of the proposition that the Commission must consider issues other than those under Section 4(1) of the Act. The significance of the quotation relied on by the Board of Trade (Brief, p. 18) and the United States (Brief, pp. 23-24), can only be gained on consideration of the issues presented to the Court in that case. That was a suit by railroads to set aside orders of the Commission entered in *Railroad Commission of Nevada* v. *Southern P. Co.,* 21 I.C.C. 329 (1911); and *City of Spokane* v. *Northern P. Ry. Co.,* 21 I.C.C. 400 (1911). In those cases the railroads had applied for relief from the long and short haul provision of Section 4 of the Act. The Commission

refused to grant the petition unqualifiedly, but entered a fourth section order permitting lower rates from the Atlantic Seaboard to the Pacific Coast provided that a proportionate relation was maintained between the lower rate for the longer haul to the Pacific Coast and the higher rate to intermediate points.

Those orders were challenged as being unconstitutional in that they were based on an unconstitutional delegation of legislative power in Section 4 of the Act, or that the orders were violative of Section 4 as properly construed. One of the basic questions was whether the I.C.C. had been given unlimited discretion without standards in the exercise of its authority to grant relief from the long and short haul prohibition of Section 4.

The Commission reports refer to the prejudice or discrimination to intermediate origins or shippers. No reference is made to the prejudice prohibited by Sections 2 or 3 of the Act which have broader application than Section 4. The Commission held that:

> "The test which the Commission must now apply to determine whether the carrier may be given the advantage of an exception to the general rule of section four is the same test that it may apply with respect to any other discrimination or inequality. There is incorporated in section four every standard set up by Congress as a guide to this Commission which is to be found in any section of the act." (21 I.C.C. 338).

and further said:

> "In short, Congress has undertaken to specify distinctly one practice which it wishes especially to destroy and charges this Commission not to permit it to obtain unless such discrimination, such preference, such practice may be shown not to be a discrimination

that is unjust, a preference that is undue, or a practice that is unreasonable, because of peculiar facts and conditions." (21 I.C.C. 339)

The Commission went on to say that in dealing with the fourth section applications before it, it would apply the following principles:

"(1) That the fourth section as amended in 1910 is as a whole constitutional, a provision of law within the proper scope of Congressional jurisdiction.

"(2) That the proviso authorizing this Commission to permit exceptions to the general prohibition of the section is not a grant of arbitrary or absolute power, but its exercise must be limited and conditioned upon the presence in special cases of conditions and circumstances which would make such exceptions legal and proper and in no wise antagonistic to other provisions of the act.

"(3) That it must be affirmatively shown by the carriers seeking such exception that injustice will not be done to intermediate points by allowing lower rates at the more distant points.

"(4) That the intendment of the law is to make its prohibition of the higher rate for the shorter haul a rule of well-nigh universal application from which this Commission may deviate only in special cases and then to meet transportation circumstances which are beyond the carriers' control; that is to say, a carrier shall not prefer the more distant point by giving it the lower rate because of any policy of its own initiation, but if at the more distant point it finds a condition to which it must conform under the imperious law of competition if it would participate in traffic to that point it may discriminate against the intermediate point without violating the law, provided it establishes such necessity before the Commission. But to this discrimination there may be a limit set by the Com-

mission. The discrimination may not be such as to offend the reasonable standards of the law, for it is said that the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section." (21 I.C.C. 341)

The whole sense of the reports of the Commission was a concern about prejudice or discrimination to intermediate points resulting from lower rates for longer hauls. That was the fact situation presented to the Commission and to this Court. In upholding the Commission order, this Court stated:

"• • • the situation under the amendment is this: Power in the carrier primarily to meet competitive conditions in any point of view by charging a lesser rate for a longer than for a shorter haul has ceased to exist because to do so, in the absence of some authority, would not only be inimical to the provision of the fourth section but would be in conflict with the preference and discrimination clauses of the second and third sections. But while the public power, so to speak, previously lodged in the carrier is thus withdrawn and reposed in the Commission the right of carriers to seek and obtain under authorized circumstances the sanction of the Commission to charge a lower rate for a longer than for a shorter haul because of competition or for other adequate reasons is expressly preserved and if not is in any event by necessary implication granted. And as a correlative the authority of the Commission to grant on request the right sought is made by the statute to depend upon the facts established and the judgment of that body in the exercise of a sound legal discretion as to whether the request should be granted compatibly with a due consideration of the private and public interests concerned and in view of the preference and discrimination clauses of the second and third sections." (234 U.S. 485-486.)

There the preference and discrimination considered was preference of long haul shippers and discrimination to the short haul shippers at intermediate points, i.e., the specific forms of discrimination prohibited by section 4.

The language of that case should not be stretched to include consideration under Section 4 of prejudice or discrimination at other than intermediate points. That interpretation is inconsistent with the subsequent opinions in *United States* v. *Merchants' & Manufacturers Association* and *Seatrain Lines, Inc.* v. *United States, supra.*

Appellants and the United States argue that the unitary design of the Interstate Commerce Act, emphasized by the National Transportation Policy, requires the Commission when acting solely under Section 4 of the Act to make final determination of lawfulness of rates under all other Sections of the Act (United States Brief pp. 24-25; Mechling Brief p. 35; Board of Trade Brief pp. 28-29). This argument that every prohibition or requirement of the Act is written into Section 4 conflicts with this Court's opinion in *Skinner & Eddy Corp.* v. *United States,* 249 U.S. 557 (1919). There, in reference to Section 4, it is stated that:

> "A special group of cases in which the Commission may indirectly prevent unduly low rates through its power to prevent unjust discrimination is that provided for by the long-and-short-haul clause. It was enacted to remedy one large class of discrimination by creating a legislative presumption that the charge of more for a short haul under substantially similar circumstances and conditions than for a longer distance over the same line in the same direction was unjust." (p. 566)

Mechling cites *American Trucking Ass'ns.* v. *United States,* 355 U.S. 141, 152 (1957), in support of the proposition that the Commission must make determination under Sections

1, 2, and 3 in this proceeding (Brief p. 35). In that case, it was determined that although the Commission must take cognizance of the National Transportation Policy and apply the Act as a whole, the Commission did not act beyond its statutory authority in failing to read two separate sections of the Act as one.

The Commission is not strait-jacketed as to procedures. In Section 17(3) of the Act, Congress provided only that the Commission shall conduct the proceeding under any provision of law in such manner as will best conduce to the proper dispatch of business and to the ends of justice.

While it is the Commission's policy to determine all issues in one proceeding, if those issues are properly raised, *Mississippi Railroad Commission* v. *Alabama & V. Ry. Co.*, 120 I.C.C. 569, 573 (1927)[18], issues under other sections of the Act in this case were not properly raised by appellants.

Briefs of appellants and the United States refer to the petitions for suspension and the protests to the granting of the temporary fourth section order as pleadings which raised issues under other sections of the Act. However, those petitions and protests were denied by the Commission (R. 87, 88, 90, 92) those petitions were not the subject matter of the hearing. The only matter set for hearing was the fourth section application which raised issues only under Section 4 of the Act.

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[18] *Mississippi Railroad Company* v. *Alabama & V. Ry. Co., supra,* quoted by the United States (Brief p. 20) in which the Commission did not decide the fourth section issues in deciding other issues that were raised by complaint filed under Section 13(1) of the Act because the railroads were not ready to proceed reinforces appellees argument that the Commission only decides issues presented by the order or complaint that is the basis of the hearing.

The Commission on four separate occasions prior to hearing advised Mechling and the Board of Trade of their right to file a complaint in which they could raise all issues of lawfulness. The first advice was given on August 26, 1957, in the Commission's notice of the action of its Board of Suspension in concluding not to suspend the involved rates and institute an investigation into their lawfulness under Section 15(7) of the Act (R. 87).

Appellants were similarly advised by the language of the Temporary Fourth Section Order No. 18784 entered on August 27, 1957, (R. 87).

Similar advice was given on August 27 and 28, 1957, in the notices of the Commission of the action of the Division 2 of the Commission, the appropriate appellate division, in voting to affirm the action of the Commission's Board of Suspension (R. 90) and it Fourth Section Board (R. 92).

Thus the parties were not only advised of the simple procedural step to be followed if they desired to raise issues other than those under Section 4, but they were on notice from the temporary fourth section order and the Commission's notice of hearing herein (R. 92), that only fourth section issues were presented for consideration.

The hearing before the Commission was first set for December 4, 1957, (R. 92) three months after Mechling and the Board of Trade were advised of their rights and of the procedural steps that should be taken to implement them. Plaintiffs could have filed a complaint and the Commission would have set it for hearing with the fourth section application; *Mississippi Railroad Commission* v. *Alabama & V. Ry. Co., supra*. No delay would have resulted. The filing of a complaint under the Commission's Rules of Practice

[49 C.F.R. 1.26 *et seq.*] would have been a simple matter for Mechling and the Board of Trade who had already asserted alleged violations of the Act in their request for suspension of the rates. Thus no burdensome procedural problems were presented. This is not a matter of procedural importance in connection with the administration of the Interstate Commerce Act.

Appellants, apparently ignoring the fact that prior to the hearing they were advised by four separate orders that they should file complaints as to the lawfulness of the rates under Section 13(1) of the Act, argue that prior Commission decisions indicate that this was unnecessary. Based on that assumption, the argument is then made that the change in the Commission's procedures here was unfair.

However, this appellee submits that it reasonably relied on the assmption that the Commission orders were meaningful and that the order setting the hearing on the fourth section application raised issues under Section 4 only in view of the Commission's notices that other issues would be determined in complaint proceedings. It is submitted that it would be unfair to subject this appellee to severe injury through a forced return to a noncompetitive status because of appellants' continuous failure to file complaints.

The cases cited by Mechling (Brief p. 34), The Board of Trade (Brief pp. 26-27, Appendix B), and the United States (Brief pp. 21-22), do not indicate a well entrenched practice to treat Section 4 proceedings as though they were general investigations. Almost all of the cases fail since they were (a) not fourth section proceedings;[19] or (b) general investigation proceedings under Section 15(7) of the Act

[19] *City of Spokane* v. *Northern Pacific Ry. Co.*, 21 I.C.C. 400, 426 (1911).

where the lawfulness of the rates are in issue;[20] or (c) cases in which the relief sought was granted;[21] or (d) where a "special case" was found not to exist since discrimination would result at intermediate points;[22] or (e) where the rates were found to be noncompensatory.[23]

Moreover, the Commission's practice not to make final determination under the other sections of the Act has been stated in all fourth section orders issued since *Intermountain Rate Cases, supra*, in 1914.

To find the Commission's order here to be invalid because the Commission did not convert its hearing under Section 4 into a general investigation of the rate structure under all sections of the Act would effectively straight-jacket Commission procedures.

2. The Commission's Report and Order are in Full Accord with the National Transportation Policy.

In the execution of its power to grant partial, conditional

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[20] *Crude Barytes Ore from Missouri to Corpus Christie and Houston*, 295 I.C.C. 505, 508 (1956); *Passenger Fares, Hell Gate Bridge Route, New York, N. Y.*, 296 I.C.C. 147, 153 (1955); *Iron and Steel from Minnequa to Kansas, Nebraska and South Dakota*, 278 I.C.C. 163, 168-169 (1950).

[21] *Intermountain Rate Cases*, 234 U. S. 476 (1914); *Nepheline Syenite from Ontario, Canada, to the East*, 308 I.C.C. 561, 564-565 (1959); *Coal and Coal Briquets in the South*, 289 I.C.C. 341, 376-377 (1953); *Lumber from the South and Southwest*, 245 I.C.C. 67, 73-74 (1951); *Commodity Rates on Lumber and Other Forest Products, in Carloads, From South Pacific Coast Territory to Points in Central Freight Association Territory*, 165 I.C.C. 561, 569 (1930); *Differential Routes to Central Territory*, 211 I.C.C. 403, 421 (1935); *Railroad Commission of Nevada* v. *S. P. Co.*, 21 I.C.C. 329, 338-339 (1911).

[22] *Sand and Gravel to Northfield and Evanston, Ill.* 234 I.C.C. 65 (1939); *Pig Iron to Butler, Pa.*, 222 I.C.C. 1 (1937); *Bituminous Fine Coal to LaCrosse, Wis.*, 311 I.C.C. 257 (1960).

[23] *Transcontinental Cases of 1922*, 74 I.C.C. 48 (1922).

relief from the prohibition of charging more for longer than shorter hauls contained in Section 4(1) of the Act, as in the administration of all other sections of the Act, the Commission must be guided by the National Transportation Policy. That it did so before entering the fourth section order under review by this Court is evidenced by the numerous, detailed findings of evidentiary and ultimate facts contained in the Commission's Report.

For example, among other things the National Transportation Policy directs the Commission to:

> "* * * promote safe, adequate, economical and efficient service and foster sound economic conditions in transportation * * * "

In this regard the Commission found that the operating distance of the New York Central from Kankakee Belt origins to Kankakee is approximately one-half the rail distance from Chicago to Kankakee; that origin switching operations at Chicago are more complex than at Kankakee; that no additional trains or power units were needed to handle the additional corn traffic from Belt origins to Kankakee, and that the barge-rail route to Kankakee was from 133 to 797 percent more distant than the direct rail route (R. 23-24).

It also found that:

> "It is clear that the competitive situation which prevailed prior to the proposed rate between the all-rail and the barge-rail rates on corn from the northern Illinois territory to the East required an adjustment in the all-rail rates, and that such an adjustment requires fourth-section relief" (R. 27).

The preexisting "competitive situation" was the virtual monopoly of the less efficient barge-rail routes. Thus, the

fourth section departure rates promote economical and efficient service and are, as the Commission expressly found, "in the public interest".

In the course of its administrative functions, the Commission must also recognize and preserve the "inherent advantages" of each of the various modes of transportation. However, it is for a protesting carrier who relies on a claim of inherent cost advantage to bear the burden of persuading the Commission of the existence of that advantage. See, *I.C.C. v. New York, N. H. & H. R. Co.*, 372 U.S. 744, 760, footnote 12. (1962)

Because corn is a homogeneous commodity which loses all identity when stored in bulk, it is impossible to say that Kankakee Belt corn barged to Chicago and elevated there with other corn is the identical corn purchased by a processor at Kankakee on the Chicago market and shipped by rail to Kankakee for movement beyond. It is clear from the Commission's findings, however, that the Belt corn which moved directly by rail to Kankakee after the effectivenesses of the fourth section rates displaced corn that would have moved by barge to Chicago. The processors at Kankakee and points south thereof, who were the principal users of those rates, previously purchased equivalent amounts of corn on the Chicago market for rail movement to Kankakee and points south, thence to eastern destinations as corn products (Exhibit 14). Thus, the Belt corn moving direct to Kankakee by rail, displaced corn that would have moved by barge-rail to Kankakee via Chicago.

As the fourth section rates apply only on movements to Eastern destinations, it follows that the competitive modes of transportation are barge-rail via Chicago to Kankakee, thence east, versus all-rail to Kankakee, thence east. The

rail movements beyond Kankakee would entail identical transportation services. Logically then, in order to evalnate the inherent advantages of the competing modes of transportation, the cost of providing barge-rail service to Kankakee must be compared to the cost of providing all rail service to Kankakee.

Appellant Mechling, who asked the Commission to protect a claimed inherent advantage, thus had the burden of showing that the cost of providing barge-rail service to Kankakee was less than that over direct rail route. Its presentation was fatally defective in that it offered only evidence of the barge portion of that service.[24]

Because of the numerous additional expenses incurred in the rail movement of ex barge corn from Chicago to Kankakee over and above that required to move directly by rail to Kankakee it would have been impossible for Mechling to prove any inherent advantage of the barge-rail route. It

[24] The Commission attempted to obtain an explanation of this fundamental deficiency from barge line's counsel at oral argument but was not given a responsive answer:

"Commr.Hutchinson: That is where the difficulty comes, is it, or not, that that cost, operating cost figure, doesn't cover as much service as the cost figure on the other side covers, is that it?

"Mr. Legg: I would say it covers probably as much service but there are a lot more services to handle barge corn than there are to handle rail corn.

"Commr. McPherson: The question is, overall, who is the low-cost carrier?

"Mr. Legg: I think probably we still are, but then it would be a very close case, if you took that view. I think you should take the view, though, that if we can provide a low-cost service of transportation, then whatever services are incurred by the shipper beyond that, we have to take care of on a competitive basis. But they won't be incurred by the shipper if we cease to be low-cost by as much as we are now." (R. 836).

is fairly obvious that the direct route would be the low cost means of transportation.

Finally, the Commission found that the fourth section rates do not constitute a destructive competitive practice. This conclusion is supported by the lack of any inherent cost advantage over the competitive barge-rail route.

It is also supported by the Commission's findings that the fourth section rates are no lower than necessary to meet the competition of the barge-rail rates which is in turn based on subsidiary findings (see pp. 8-11 supra).

How can one argue that this limited reduction of an absolute monopoly amounts to destruction of competition? Mechling increased its rates a year after the competition's rail combination rates became effective (R. 301). Mechling was undoubtedly aware of the anomaly of its position and studiously avoided any reliance on the National Transportation Policy except to the extent of a claimed inherent advantage, the speciousness of which has been demonstrated.

The argument of the United States on the destructive competition issue also ignores the small portion of total available traffic attracted by the direct rail route after the effectiveness of the fourth section rates. Instead, it relies upon two mistaken assumptions of fact.

First, it accepts Mechling's contention that the barge-rail route has an inherent cost advantage. The invalidity of that assumption has been demonstrated.

Secondly, it accepts Mechling's evidence that the proportional rate to Kankakee is non-compensatory despite the Commission's rejection of "unsifted averages" such as

those condemned in *I.C.C.* v. *Mechling*, 330 U.S. 567, 583, and chooses to ignore the numerous factual findings of the Commission concerning the efficiency of operations over the Belt line to Kankakee, the avoidance of costly switching operations at Chicago and the net revenue gain to applicant railroads which results from the reduction of operating expenses and the increase in revenue received. Thus it would substitute its judgment for that of the Commission on an issue which this Court has expressly stated "should be left for initial resolution to the Commission's informed judgment", *I.C.C.* v. *N.Y. N.H. & H. R. Co.*, 372 U.S. 744, 761 (1946). Futhermore, its entire argument on this issue ignores the fact that the proportional rate to Kankakee only applies on transportation to more distant points and has no independent existence, that it is merely a device which permits efficient computation of through transportation charges, and that no shipper is ever assessed the proportional rate directly as is the case with the barge rates.

The Commission, the body created by Congress to deal with such technicalities of publication, determined that the fourth section departure rates could have been published as one-factor through rates as easily as combination through rates and concluded that the condemnation of the rates merely because of the form they took in a tariff would be an exercise in futility. Absent some compelling reason not yet urged by any party to these proceedings, the Commission's judgment on such an issue should be entitled to acceptance by this Court.

V.

CONCLUSION.

The unanimous judgment of the Statutory Three Judge District court dismissing the complaint against the Commission's order should be affirmed.

Respectfully submitted,

RICHARD J. MURPHY
1225 LaSalle Street Station
Chicago 5, Illinois
Attorney for The New York Central Railroad Company, Appellee

Dated January 17, 1964

PROOF OF SERVICE.

I, RICHARD J. MURPHY, Attorney for Appellee, The New York Central Railroad Company, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 17th day of January, 1964, I served copies of the foregoing Brief For Appellee The New York Central Railroad Company on the several parties by mailing copies thereof in duly addressed envelopes, with postage prepaid, as follows:

1. On the Appellant, Board of Trade of the City of Chicago, copies to its attorneys Harold E. Spencer, Esq., and Richard M. Freeman, Esq., One North LaSalle Street, Chicago 2, Illinois.

2. On the Appellants, A. L. Mechling Barge Lines, Inc., Ira Bookwalter, Cullom Cooperative Grain Com-

pany, Charles Treasure, Griswold Grain Company, and Mazon Farmers Elevator, copies to their attorneys Edward B. Hayes, Esq., and Wilbur S. Legg, Esq., 135 South LaSalle Street, Chicago 3, Illinois.

3. On the Appellee, United States of America, copies to the Honorable Archibald Cox, Solicitor General of the United States, Department of Justice, Washington 25, D. C., and to James P. O'Brien, Esq., United States Attorney for the Northern District of Illinois, Room 450 United States Court House, Chicago, Illinois.

4. On Appellee Interstate Commerce Commission, copies to Robert W. Ginnane, Esq., its General Counsel and H. Neil Garson, Esq., its Associate General Counsel, Washington 25, D. C.

5. On Appellees, Farmers Cooperative Elevator Company, Federal North Iowa Grain Company, Milla Grain & Supply Company, Union Hill Farmers Elevator, Neilsen Grain Company, Ferris Grain Company, Frank Gibbons Grain Company, Cahill Grain Company, Diemer Grain Company, Priscilla Grain Company, McNabb Grain Company, Missal Farmers Grain Company, Payne-Stotler Grain Company, Lostant Grain Company and Isaac Barrett Grain Company, and copies to their attorney, Leo P. Day, Esq., 6202 South Campbell Avenue, Chicago, Illinois.

.....

RICHARD J. MURPHY

APPENDIX

National Transportation Policy, preceding 49 U.S.C. § 1.

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

Section 1(5) of Interstate Commerce Act [49 U.S.C. §1(5)]

"All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

Section 3(1) of Interstate Commerce Act [49 U.S.C. §3(1)]

"It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or

cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

Section 3(4) of Interstate Commerce Act [49 U.S.C. §3(4)]

"All carriers subject to the provisions of this part shall, according to their respective power, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term 'connecting line' means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III."

Section 4(1) of Interstate Commerce Act [49 U.S.C. §4(1)]

"It shall be unlawful for any common carrier subject to this part or part III to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being

included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this part or part III, but this shall not be construed as authorizing any common carrier within the terms of this part or part III to charge or receive as great compensation for a shorter as for a longer distance: *Provided*, That upon application to the Commission and after investigation, such carrier, in special cases, may be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property, and the Commission may from time to time prescribe the extent to which such designated carriers may be relieved from the operation of the foregoing provisions of this section, but in exercising the authority conferred upon it in this proviso, the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and no such authorization shall be granted on account of merely potential water competition not actually in existence: *Provided further*, That any such carrier or carriers operating over a circuitous line or route may, subject only to the standards of lawfulness set forth in other provisions of this part or part III and without further authorization, meet the charges of such carrier or carriers of the same type operating over a more direct line or route, to or from the competitive points, provided that rates so established over circuitous routes shall not be evidence on the issue of the compensatory character of rates involved in other proceedings: *And provided further*, That tariffs proposing rates subject to the provisions of this paragraph requiring Commission authorization may be filed when application is made to the Commission under the provisions hereof, and in the event such application is approved, the Commission shall permit such tariffs to become effective upon one day's notice."

Section 13(1) of Interstate Commerce Act [49 U.S.C. §13(1)]

"That any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier complaining of anything done or omitted to be done by any common carrier subject to the provisions of this part, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper."

Section 15(1) of Interstate Commerce Act [49 U.S.C. §15(1)]

"That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of

persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed."

Section 15(7) of Interstate Commerce Act [49 U.S.C. §15(7)]

"Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of

such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, in a rule, regulation, or practice, after the date this amendatory provision takes effect, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over

all other questions pending before it and decide the same as speedily as possible."

Section 17(3) of Interstate Commerce Act [49 U.S.C. §17(3)]

"The Commission shall conduct its proceedings under any provision of law in such manner as will best conduce to proper dispatch of business and to the ends of justice. The Commission shall have an official seal, which shall be judicially noticed. Any member of the Commission, the Secretary of the Commission, or any member of a board may administer oaths and affirmations of any member of the Commission or the Secretary of the Commission (or any member of a board in connection with the performance of any work, business, or functions referred under this section to a board upon which he serves) may sign subpenas. A majority of the Commission, of a division, or of a board shall constitute a quorum for the transaction of business. The Commission may, from time to time, make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before, it or before any division, individual Commissioner, or board, including forms of notices and the service thereof, which shall conform, as nearly as may be, to those in use in the courts of the United States. Any party may appear before the Commission or any division, individual Commissioner, or board and be heard in person or by attorney. Every vote and official act of the Commission, or of any division, individual Commissioner, or board, shall be entered of record, and such record shall be made public upon the request of any party interested. All hearings before the Commission, a division, individual Commissioner, or board shall be public upon the request of any party interested. No Commissioner or employee shall participate in any hearing or proceeding in which he shall have any pecuniary interest."

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Nos. 58-59

Supreme Court of the United States

OCTOBER TERM, 1963

A. L. MECHLING BARGE LINES, INC., ET AL.,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Defendants-Appellees.

BOARD OF TRADE OF CITY OF CHICAGO,
Appellant,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and THE NEW YORK CENTRAL RAILROAD COMPANY, ET AL.,
Appellees.

On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

BRIEF OF McNABB GRAIN COMPANY, ET AL., DEFENDANTS-APPELLEES

LEO P. DAY,
6202 South Campbell Avenue,
Chicago 29, Illinois
Attorney for the above-named Defendants-Appellees.

McCORMICK & HENDERSON INC., CHICAGO, ILL.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

Nos. 58-59

A. L. MECHLING BARGE LINES, INC., ET AL.,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Defendants-Appellees.

BOARD OF TRADE OF CITY OF CHICAGO,
Appellant,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and THE NEW YORK CENTRAL RAILROAD COMPANY, ET AL.,
Appellees.

On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

BRIEF OF McNABB GRAIN COMPANY, ET AL., DEFENDANTS-APPELLEES

I.

DECISION BELOW

This is an appeal from a final judgment of a three-judge district court dismissing a complaint seeking to set aside an order of the Interstate Commerce Commission. The Commission's order, entered after hearing on the railroads' fourth section application, permitted the carriers to maintain rates which were lower in some instances for longer distances than for shorter distances over the same line or route.

II.

STATEMENT

A. Interest of These Appellees

The appellees, in whose behalf this brief is filed, are operators of small country elevators at stations west of Kankakee, Illinois, on the Kankakee branch of the New York Central Railroad (hereinafter referred to for convenience as the "Belt.") They buy and sell corn grown within approximately five miles of their elevators which is shipped to corn processors and others, and perform services such as are usually rendered by country elevators.

For many years these elevators were able to carry on normal elevator operations in their respective communities. However, with the improvement of the Illinois Waterway some 20 years ago, the inauguration of barge transportation thereon at low charges, the construction of numerous large elevators along the waterway by Chicago grain companies, and continuing increases in railroad rates to an unreasonably high level, the puissant Chicago interests were able to attract away from these appellees to their river elevators and barge transportation substantially all

of the corn tonnage that these appellees had handled for many years, thereby forcing the closing of appellees' elevators and discontinuance of rail shipments. As the Commission found (R. 27) they were then compelled to take on "the function of merchandisers employed at taking the corn off the farmer's hands and marketing it at the river." In the meantime, some elevators along the Belt were abandoned or fell into disrepair. (R. 777, 778) When, on December 15, 1956, the railroads finally established a reasonable level of rates to the East, appellees were able to reopen their elevators, resume operations, and obtain for themselves a portion of the corn that had been attracted away from them to the river.

These Appellees feel that if the Commissioner's order is invalidated the river will once again monopolize the corn business and force the small rail elevators out of business.

B. The Origin Area

The Kankakee Belt (formerly the Indiana, Illinois & Iowa Railroad Company) extends eastwardly to South Bend, Ind., and has connections east of Kankakee with every railroad operating out of Chicago to the East. For convenience, a map of the Belt (with highway distances ranging from 4 to 36 miles from its stations to the ten competing river ports superimposed thereon) is attached hereto as Appendix A. (Exs. 1, 2, R. 295). The record indicates that *beyond* Moronts there is no corn grown along the New York Central. (R. 370) The Belt is a line of low traffic density, serving a rural area in the Illinois corn belt. There are no cities or large towns west of Kankakee—Streator being the largest—and it serves very few industries. Because of the inroads made on its traffic by barge and motor truck in recent years, its business

has been "drying up." (R. 366) Many stations on the line have been closed and serious consideration had been given to abandoning the west end of this branch. (R. 298, 328, 355, 409)

The rates involved in this proceeding were published to apply from 17 stations on the Belt west of Kankakee, between Van's Siding and Moronts. Moronts, the most remote point, is on the river and four miles from the nearest river port of Spring Valley. As indicated on Appendix A, hereto attached, the river bends to the south at Moronts, and the Belt's rails run in the same general direction for about 10 miles before turning to the east.

The Mechling brief (p. 16) attempts to minimize the competitive pull at five of the ten river ports, stating:

> "* * * Lockport and Joliet were not affected by the reduced rate to the same extent as other ports (by reason of their distance from the Belt) and that from Hennepin, Henry and Lacon the predominant movement was south in the earlier period and to Chicago in the later period. * * *"

But its contentions are not sustained by the record. From Union Hill (by far the largest shipping point on the Belt and only 14.6 miles from Kankakee) the shortest distances to the river are to Joliet and Lockport, 31 and 35 miles, respectively. From Van's Siding, the shortest distances to the same ports are 32 and 36 miles. The shortest distance from Union Hill to Morris is 36 miles, and from Van's Siding, 35 miles. The distance from Reddick on the Belt to Morris is 31 miles. (Appendix A)

To say, as the Mechling brief does, at p. 38:

> "that Lockport and Joliet were too far removed from the Belt to be influenced much by the Belt operation"

is an attempt to depreciate the importance of the increasingly large corn tonnage shipped from Lockport and Joliet, and overlooks testimony of record that the river elevators draw corn grown within 40 miles of the river (R. 761), an area previously described in the Mechling brief (p. 14) as

> "• • • *the larger supply area required for the large operation of river elevators* • • • as compared to the small operations of railroad elevators shipping 50 tons in one rail car."

Appellants would likewise have it appear that the river elevators at Henry, Hennepin and Lacon (at the west end of the origin area) are not competitive with these railroad elevators on the Belt, but here again the evidence is to the contrary. The river elevators named are from 6 to 23 miles distant from the nearest Belt stations, while the shortest distance to the river from any Belt station east of Dwight is 25 miles. (Appendix A)

The operator of the Henry elevator on the river testified as to his competition from four Belt stations. (R. 718-720) There was no testimony from the Lacon and Hennepin elevators, but the operator of the Wenona elevator testified that the 220,000 bushels of corn he sold in each of the 1955-1956 and 1956-1957 years for river movement was sent to the ports of Lacon, Henry, Spring Valley, LaSalle or Hennepin in competition with the outlet of the New York Central. (R. 670-671) Witness Noder of the McNabb rail elevator testified to his competition with river elevators at Hennepin, Henry, and Lacon, among others, but mainly with Hennepin, Henry and Spring Valley. (R. 491, 492, 496.)

It is stated on page 16 of the Mechling brief that the predominant movement from Hennepin, Henry and Lacon was to the south in the earlier period (1956) and to Chi-

cago in the later period (1957.) The Commission's finding was that "the greater part of Mechling's corn business (from the three elevators named) moved to the south in 1956 and north to Chicago in 1957."

The Henry elevator witness said that while he makes some shipments to the South, the Chicago market is very important to him

> "because it gives us a continuing market where we always have an outlet; through the south, as I mentioned before, it is kind of an off and on proposition. At times you can move considerable volume that way, but there are quite a few times when you can't move anything." (R. 718)

The total river movement of corn from the ten competitive ports to Chicago 402,105 tons in the period December 15, 1955 to August 30, 1956 increased to 493,668 tons in the corresponding period the following year. (R. 28) It is indeed noteworthy that, in spite of the lack of rail competition to Chicago in 1956 and its existence in 1957, the preponderance of Mechling's corn tonnage should have moved to Chicago instead of to the South, as in 1956. This fact, along with the material increase in river-borne corn to Chicago from the ten competing ports, illustrates how little the fourth section rates have affected the river movement.

The flow of corn from the Belt area to river elevators of the large Chicago grain merchants has increased in recent years to awesome proportions, and new elevators of large capacity are continually being built along the waterway to take care of the ever-increasing river movement. Most of the river ports have two or more elevators. Morris, for example, has four, belonging to as many different Chicago companies. (R. 760) The predilection of the Board of Trade and its members for river transportation from

this area is indicated by the following statements of its chief witness, who also acted as counsel:

> "We have tremendous investments in Chicago, built upon the river and its low cost transportation, which gives Chicago an opportunity to utilize its natural advantages of being on the Great Lakes, on the inland waterways, as well as being able to be served by truck and rail." (R. 796)

and

> "* * * we have a real interest in grain that comes in by barge * * *." (R. 797)

Appellant, Mechling Barge Lines, Inc., (hereinafter referred to for convenience as "Mechling") as a water carrier of corn and other bulk freight, is exempt from all rate regulation by virtue of the provisions of Section 303 (b) of the Interstate Commerce Act. [49 U.S.C., Sec. 303 (b)] See *Mechling Barge Lines, Inc. Extension,* 306 I.C.C. 223, 225, wherein it is stated that along the Illinois Waterway, *inter alia,* Mechling "operates in the transportation of various commodities, in bulk, under the dry bulk exemption of Section 303 (b) of the Act;" and *Grain Proportionals Ex Barge to Official Territory,* 262 I.C.C. 7, at p. 19. It may also be observed in this connection that the Act (Section 203 (b) (6) similarly exempts motor carriers of corn and other agricultural products from such regulation. [49 U.S.C., Sec. 303]

Joined with Mechling in its appeal herein are five country grain dealers. There is no evidence concerning two of them, but testimony of the other three showed that their corn has been trucked for substantial distances to the river in the years prior to, and since, the rail competitive rates were established, notwithstanding the proximity of appellees' elevators to the sources of their corn and rail rates which appellants designate as "low." (R. 658, 651; 647, 640; 638, 634)

C. The Commodity Involved

Corn is an important agricultural product and the Commission is under the direction of Congress to effect such lawful changes in the rate structure of the country

> "* * * as will promote the freedom of movement by common carriers of the products of agriculture * * * at the lowest possible lawful rates compatible with the maintenance of adequate transportation service. * * *" (49 U.S.C., Sec. 55)

In *Increased Railway Rates, Fares and Charges*, 248 I.C.C. 545, 611, the Commission said:

> "Congress intends that agricultural products, including livestock, shall be afforded the lowest possible lawful transportation rates. The Hoch-Smith Resolution still is the law."

while, in *Grain and Grain Products*, 284 I.C.C. 723 (at pp. 737-738) the Commission observed that

> "Transportation of grain and grain products, storage and milling in transit, requires *complete freedom of movement.*" (emphasis supplied)

In carrying out the will of Congress the Commission has extended "leniency" of rate treatment not only to farm products, but also to commodities used by farmers, such as fertilizer and fertilizer materials, implements, etc. *Ohio Farm Bureau* v. *Ahnapee & W. Ry. Co.*, 120 I.C.C., at p. 370; *Boardman* v. *Atchison, T. & S.F. Ry. Co.*, 176 I.C.C. at p. 234.

D. Bidding for Corn by River and Rail Buyers

During the years when the river elevators and barge lines had a monopoly of the corn produced along the Belt, the price bid to farmers was the Chicago price less the rail (Illinois proportional) rate to Chicago (R. 526-527,

750) which ranged from 16.5 to 23 cents at Belt origins. (Ex. 61, p. 5, R. 815) With rail rates so high as to preclude rail shipments and the wide margin between those rates and the low barge charges, the Chicago grain interests were in complete control of prices to be paid the farmer as well as the mode of transportation to be employed. They need bid just enough under the "paper" rail rate to insure getting the corn for river movement, pay the low barge charge, and pocket the difference. The bids of the various Chicago buyers to the farmers at river elevators were identical.[1] Witness Noder of McNabb testified that during the period prior to publication of the fourth section rates he could not ship by rail because the rail rate

> "* * * was so high you just couldn't touch any corn going out of McNabb by rail. I know that." (R. 493)

and he had no outlet for his corn except the river elevators at LaSalle, Spring Valley, Hennepin, Henry and Lacon (R. 491)

With the taking effect of the competitive rail rates, marketing conditions in the area changed. Rail buyers entered the field and broke the monopoly of the Chicago grain companies. In this connection witness Graves testified as follows:

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[1] Witness Noder testified on cross-examination as follows:

"Q. With respect to river bids prior to this 5½ cent rate, how did you find a bid on a given day at these different points you referred to, were they approximately the same?

A. Just about all the time they were the same.

Q. So it would be fair to say then that the bid price at LaSalle or Spring Valley or Henry would be the same on a given day.

A. (Nodded.) (R. 498)

"Before December 15, 1956, the river elevators had no competition, but since that date the farmer has had a healthier situation in that he has had two markets for his corn; rail and barge. With the five and a half cent rate, competition between the rail and barge buyers was established. In my opinion this resulted in higher bids from barge buyers and rail buyers than would have been made if only barge buyers had been in the market." (R. 526)

Witness Noder also testified that farmers are benefited by the competitive rail rate "by the fact that their price is no longer determined by a single bid but by competition between several bids." (R. 490)

A number of appellants' witnesses complained because the entry of rail buying in the area forced them to make higher bids to the farmer in order to purchase corn for river movement. (R. 698, 676, 669, 665, 661, 657)

Witness Graves pointed out, however, that the buying advantage is still with the river buyers, and the uninterrupted and increasing flow of corn to the competing river elevators (despite the handicap in many instances of long trucking hauls from sources near Belt shipping points) abundantly confirms his testimony. The instances where Belt elevators have been able to obtain a share of the traffic were described by witness Cahill as those where it is 15 miles from his elevator to the river and "the producer only lives a mile from our elevator or 3 miles or something like that." (R. 478) The McNabb elevator witness gave as an additional reason why he is sometimes able to buy corn under the present rates is

"because we are a co-op and we pay a patronage dividend * * *." (R. 499-500)

E. Accessorial Services

The so-called accessorial expenses referred to in the record in this proceeding are those incurred by shippers for services not performed, or charged for, by either barge or rail carriers.[2] They are discussed in the Mechling brief (p. 13) but only as they occur in connection with barge shipments. However, the same services are performed, and to the same extent, in the case of all-rail shipments.

Corn is shelled at the farm and trucked either to a rail or river elevator, the expense of such trucking being borne by the farmer. (R. 490, 523) For equidistant truck hauls, the trucking cost[4] would be the same to either rail or river elevator. (R. 763) At the rail elevator, corn is weighed, graded, elevated into storage bins, and thereafter re-elevated to box cars, all of which services are comparable to those at the river elevators. (R. 524, 525, 565, 772, 778, 824) There is a trimming, or leveling, operation on both rail and barge corn, the cost thereof being borne by the elevator in either case. (R. 525)

Corn purchased for rail shipment is bought f.o.b. rail car, while river elevators customarily purchase corn for

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[2] A milling-in-transit charge of 1¼¢ per cwt., is assessed on shipments milled-in-transit at Indianapolis and other points east of the Illinois-Indiana state line under railroad tariff provisions. (R. 564, 784)

[4] A witness for appellants observed that it is unusual to consider trucking costs in a proceeding of this kind, but if such costs are to be considered as factors in determining the right of railroads to meet water competition, there is clearly no reason to consider them in connection with barge transportation and disregard them on the competitive all-rail movements. (R. 810)

river movement f.o.b. truck at the river elevator, *i.e.*, before unloading into elevator for transfer to barges. All corn, whether for rail or river, incurs similar expenses over and above the carriers' charges for transportation. (R. 523, 524, 525, 740, 763, 443, 463, 490, 721, 730, 749, 750)

Rail corn at Kankakee or Indianapolis must be elevated at those points in the same manner as barge grain is elevated at Chicago. (R. 828-829, 523, 570, 766) The Chicago grain firms have large elevators in Chicago in addition to those along the Waterway. The Illinois Grain Corporation witness testified that his company makes a charge of 2¼¢ per bushel for elevation at its Chicago elevator, which includes an element of profit, whereas the elevation performed at the rail points named is solely for account of the processors. Inspection is required at Indianapolis and Kankakee the same as at Chicago. (R. 828, 561)

The aggregate cost of the various accessorial services in connection with rail shipment was shown by the Kankakee witness to be 14.28 cents per cwt. The expense for corresponding services incurred on barge-rail movements was subsequently shown by the Cargill and Illinois Grain witnesses to be 13.65 and 13.3 cents, respectively. (Ex. 25, R. 525; 728, 755-756)

The following table shows the expenses listed by the witnesses for the barge-rail shippers as contrasted with those all-rail shown by the witness for General Foods Corporation:

Barge-Rail			*All-Rail*	
	Cunningham (cents per cwt.)	*McClintock* (cents per cwt.)	*Graves*	(cents per cwt.)
Truck to river	5.36	5.4	Truck to elevator	5.36
Transfer to barge	2.68	2.7	Transfer to car	4.46
Barge rate	4.95	4.4	Rail rate to Kankakee	5.5
Stevedoring	1.15			
			Elevation at Kankakee	4.46
Transfer to box car at Chicago	4.01	5.2	Rail rate beyond	53.5
Outbound Inspection	.45	—		
Rail rate	53.5	53.5		
Total	72.1	71.2		73.28

(R. 727-729; Ex. 39, R. 754; Ex. 25, R. 526)

Trucking cost to the rail elevator is concededly the same as for an equivalent haul to the river (R. 736) and elevation required at a country elevator the same as at the river. (R. 525, 740, 742) Corn is elevated at the Kankakee elevator the same as at Chicago or Indianapolis. (R. 523, 828-829)

The comparison of the rail bid at Missal and the nearest river elevator (referred to in the last paragraph on p. 15 of the Mechling brief) ignores the fact that corn must be trucked from farm to rail elevator and loaded into the carrier's vehicle the same as in the handling of corn to the river elevator. In discussing appellants' contentions, the Commission's report states:

"The belt bids, however, were f.o.b. trucks, after elevation; while the river bids were f.o.b. trucks, prior

to elevation into barges. By adjusting the bids to a similar basis for comparison, the river bids are seen to be higher on the average than the rail bids." (R. 20)

It is further stated therein:

"This elaborate Chicago Board of Trade proposal is defective in that it begins with the erroneous premise that the Belt bids during the comparison period were higher than river bids, when, in fact, they were not, since they applied to corn at different levels in the transportation chain. * * *"

Whether viewed from the standpoint of the bare transportation charges, barge-rail versus all-rail, or in the light of the ancillary expenses incurred by shippers plus the charges of the carriers, the evidence conclusively shows that the barge-rail movement enjoys a marked advantage over all-rail transportation.

F. Wasteful Transportation from the Origin Area by Barge and Rail Is No Longer Necessary

Prior to the taking effect of the fourth section rates, the only economic method of transporting corn grown along the Belt to the processing plant at Kankakee was as follows: trucking to a river port, barge to Chicago, transfer by switching lines to the NYC at Chicago, thence a road-haul movement of 75 miles to Kankakee, involving a transfer at Schneider, Ind., from the NYC's Danville branch to the Belt. (Ex. 29, R. 583) The Belt distance to Kankakee from Van's Siding is only 5.2 miles and from Union Hill, 14.6 miles, while the truck-barge-rail distances between the same points were in excess of 150 miles. (Ex. 56, R. 812; Ex. 29, R. 583)

In commenting upon appellees' exposition of the wasteful transportation involved, the Mechling brief (without a record reference) states at p. 29:

> "Another of the applicants had a more direct route to Kankakee, and most of the switching charges in Chicago were paid to the NYC's own subsidiaries. In addition, not all the corn shipped from the Belt was used at Kankakee • • • and routing from Chicago to Kankakee would not have been necessary on much of the remainder."

Exhibit 14 lists cars handled by Chicago switching lines and charges absorbed by the Central on the movements described. Contrary to appellants' statement quoted above most of the charges were not paid to NYC subsidiaries.[3] Moreover, the service performed and charges collected by subsidiaries were no different from those of the other lines whose charges were absorbed, and for some years the Central's switching subsidiaries have operated at a deficit of one and one-half million dollars annually, which it is required to assume. (R. 383)

Appellants' statement that "not all the corn shipped from the Belt was used at Kankakee • • • and routing from Chicago to Kankakee would not have been necessary on the remainder" is vague and incoherent. The page of the record cited (R. 802) refers to shipments from the Belt to Kankakee, Indianapolis and Paris. All such shipments would necessarily have to move via Kankakee, and there could have been no "routing from Chicago to Kankakee" on any of them unless they were forwarded from Kankakee to Chicago and subsequently back-hauled from Chicago to Kankakee.

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[3] Of 312 cars listed in the exhibit the CJ and CR&I (wholly owned subsidiaries of the Central handled 71 cars; the IHB (in which it has a majority interest) participated with foreign lines in the switching of 75 cars.

The Illinois Central (a Southern region railroad) has a shorter mileage between Chicago and Kankakee on its line to New Orleans, but this case involves only official (Eastern) territory and the ex-barge shipments previously referred to were moved from Chicago to Kankakee over the New York Central. (Ex. 14, R. 304-305)

G. Destructive Competition

Competition of these appellees for a share of the corn grown along the Belt tracks was completely destroyed several years ago due to very low barge rates and unreasonably high railroad rates. Appellees' elevators were forced to close and their elevator operations ceased until the reduced rates became effective. These facts are abundantly proved by the witnesses for these appellees.[4]

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[4] Witness Gibbons (with elevators at Sunbury on the Belt and Nevada, Ill., on the Gulf, Mobile & Ohio Railroad, testified as follows:

Q. During the period 1954 through 1956, how many carloads of free corn were shipped via the New York Central?

A. None.

Q. During this period did you cease the commercial elevation of corn?

A. Yes, we ceased it because the prices at the river elevators dictated the corn to be trucked directly to the river." (R.443)

Similarly, Witness Cahill of Budd, Ill., on the Belt, testified:

Q. Since your company is located on the New York Central, has it been your practice in the past to ship most of your corn via that railroad?

A. No. While it would seem logical that we ship our corn via the New York Central, the fact of the matter is that until December of 1956, we were unable because of the high freight rate, to do so. During the entire period 1954 through 1956, we shipped only 20 cars of free corn. There

The witness for the Illinois Cereal Mills at Paris, Ill., stated that in the three year period 1954-1956 he bought 2 cars of corn in the Belt area. His grain department "claimed all the corn went to the low barge rate to Chicago. Of course there was no corn offered to us." In the first 8 months of 1957 after the fourth section rates went into effect, he bought 327 cars of corn for rail movement. (R. 515, 516)

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were many months during which we made no rail shipments of corn at all. We could afford to ship by rail only when the river elevators were not making us a bid. The rail bids were so low that they afforded no competition whatsoever to the river bed." (R. 462)

Witness Noder, operating the elevator at McNabb, testified to the same effect, as follows:

"Q. During the period 1954 through 1956, did your company elevate corn for shipment via the New York Central?

A. No free corn. The freight rate was so high during this period that we could not afford to ship our corn by rail. So far as corn was concerned, we became merchandisers. We purchased corn from the farmers for delivery and elevation at the river elevators. * * *" (R. 489)

Operators of other country elevators off the New York Central also testified that their corn was similarly handled. Thus, the witness for the appellant Essex elevator stated:

"Q. Can you tell me how much of the 177,000 bushels you handled during the first eight months of 1956 moved to the river?

A. All of it." (R. 710)

The witness for the Gardner elevator, another appellant, testified:

Q. What percentage of the 198,000 bushels that you handled during the first eight months of 1956 moved direct

Witnesses for other corn processing firms, who are presently shipping on the competitive rail rates, also made it plain that prior to the publication of a reasonable level of rail rates from the area involved, they made no shipments of corn by rail from origins on the Kankakee branch. The witness for General Foods Corporation at Kankakee testified as follows:

"Q. In recent years, have you been able to buy any substantial amount of corn from elevators along the New York Central for rail delivery to your plant?

A. Not until December of 1956, at which time the New York Central established a rate that permitted us to enter that market again.

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from the farm to the river without being elevated through your elevator?

A. Well, I would say 98 or 99 per cent.

Q. So therefore 98 or 99 per cent of the business that you handled in 1956 you handled as a merchandiser, is that correct?

A. Yes, sir." (R. 704)

The testimony of the appellant Mazon elevator witness was to the same effect:

"Q. What percentage of the 467,000 bushels your elevator handled during the first months of 1956 moved via the river?

A. What percentage of it? All of it. (R. 697)

Q. Is that same thing true for the 1957 period?

A. Right." (R. 698)

The witness for the Farmers Grain Dealers Association testified:

"It is our observation that the rail carriers in this general area have been losing an increasing volume of corn year after year to truck and barge competition. We believe the affected railroads should seek a level of rates that would be competitive with the truck-barge cost of transportation." (R. 714)

Q. Have you bought corn from this area continuously since December of 1956?

A. Yes, except that we were forced to go out of that market in September, 1957, after the five and a half cent rate was enjoined. However, we are now back in the market. * * *" (R. 522-523)

The witness for Evans Milling Company of Indianapolis and the Indianapolis Board of Trade likewise stated that he had purchased corn for eight months in 1957 and since the temporary injunction was lifted, in 1957 and 1958. He then testified:

"Q. Now prior to December 15, 1956, did you make any purchase of rail corn from the west end of the Kankakee belt?

A. Evans Milling Company received no corn for the fifteen years prior to that time from any of these states." (R. 558)

III.

ARGUMENT.

A. Summary

As the rates involved are through combination rates from Belt origins to Eastern destinations, the Commission considered the total combination rates in its consideration of the rates within the meaning of the fourth section. The Commission did not consider the six cent proportional rate as that rate standing alone presents no fourth section problems. The form and construction of the through rates in question conform to the provisions of the statutes of the Commission's tariff rules. In view of the plain and unequivocal language of the fourth section of the Interstate Commerce Act, and consistent with its determinations extending back almost from its very beginnings, the Commission held that it is the aggregate charges for transportation from point of origin to final destination that must be considered and not a segment thereof.

The Commission's finding that the through combination charges from point of origin to point of destination are reasonably compensatory is amply demonstrated in the record by the liberal earnings yielded by the all rail rates; the rate comparisons of record. While the six cent proportional rate is not considered by itself for the reason that it is no separate existence, it should be noted that the average distance to Kankakee from the stations west thereof was but 4.4 percent of the entire haul and that six cent proportional rate accounted for 15 percent of the through charges.

The competitive combination rates which permit corn to move through the elevators of these appellees has a salutary effect on the revenues of the railroads. Under the prior non-competitive situation, the corn was forced to the

river where it was transported to Chicago by barge for transfer to rail cars in Chicago for movement south to Kankakee. The rail haul from Chicago to Kankakee for a distance of 75 miles involved the handling through congested and costly Chicago terminals as contrasted with the simple and inexpensive movements of corn for an average distance of 38 miles from the rural elevators west of Kankakee to Kankakee. The railroads avoided switching absorptions at Chicago, reduced their operating expenses, and obtained additional revenue as a result of the all rail handling.

While appellant Mechling argues that the rates are shown by cost evidence to be noncompensatory, that evidence was not found by the Commission to correctly state the rail costs.

The Commission's finding that the rates are no lower than necessary to meet competition is amply supported in this record and is extensively discussed by the Commission. The Commission's finding that the rates are not lower than necessary to meet competition is supported by the undisputed fact that the barge rail route increased its business during the time the rail route and the small country elevators obtained a relatively meager share of the business.

Under the Commission's order setting the railroad's application for a hearing and prior Court and Commission precedent, the Commission is not required to decide the lawfulness of rates under other sections of the Act in a fourth section investigation. However, even if it were required to make such a finding, there is no evidence of discrimination under Section 3(1) of the Act.

Moreover, the rates involved here do not discriminate against the barge carriers at Chicago. Section 4 appertains to direct routes only and the direct route from Kankakee origins to eastern destinations is not via Chi-

cago. As a matter of fact, the reshipping rates from Chicago and Kankakee are equal in amount. Substantially all of the traffic handled on the combinations involved moves to the East through Kankakee and not via Chicago.

The rates do not violate the National Transportation Policy. The Commission correctly and specifically found that barge carriers are not entitled to have their rates protected from a competing mode of transportation where the effort to secure traffic does not amount to destructive competition. That finding fully conforms to the National Transportation Policy and is supported by the evidence which shows that the rates are not lower than necessary to meet competition and that the barge movement of corn to Chicago continues to dwarf the modest rail movement through the country elevators along the Kankakee Belt Line.

B. The Fourth Section Rates Are Through Combination Rates From Belt Origins To Eastern Destinations

Although carriers' fourth section application (R. 138) sought

> "• • • authority to continue or to establish and maintain over their existing direct all-rail routes for the transportation of **corn products from origins** in northern Illinois **on** that part of the New York Central Railroad's **Kankakee Belt Line** extending eastward from Moronts to Van's Siding, Ill., both inclusive, **to points in central, trunk line and New England territories,** rates composed of a combination of proportional rates to and from Kankakee, Ill., as hereinafter described • • •." (R. 10). (*Emphasis supplied*).

The Mechling and Government briefs deal with a proportional rail rate of 6 cents to Kankakee.

The 6¢ proportional rate to Kankakee, as the Commission's report indicates, (R. 25) is one of the factors of

the through combination rates, but standing alone it presents no fourth section problem. Fourth section departures only occur when the outbound proportional from Kankakee is combined with the 6¢ factor. The latter is never collected as a separate charge, but enters into the computation of the through charges only after a shipment is forwarded to, or delivered in the form of corn products at, a destination in Eastern territory. In the interim, the full local rate to the milling point (whether it be Kankakee, Indianapolis, Danville or Paris) is collected and retained until reshipment occurs, at which time settlement of the through charges is made on the basis of the inbound proportional to Kankakee plus the reshipping rate beyond. (R. 756)

The form and construction of the through rates in question conform to the provisions of the statute and the Commission's tariff rules. [49 U.S.C., Sec. 6] As this Court pointed out in *St. Louis S.W. Ry. Co.* v. *United States*, 245 U.S. 136, 139:

> "A 'through rate' is an arrangement, express or implied, between connecting railroads for the continuous carriage of goods from the originating point on the line of one carrier to destinations on the line of another. Through carriage implies a 'through rate.' This *through rate is not necessarily a 'joint rate.' It may be merely an aggregation of separate rates* fixed independently by the several carriers forming the 'through route'; as where the 'through rate' is the 'sum of the locals' on the several connecting lines or is the sum of lower rates otherwise separately established by them for through transportation." (emphasis supplied)

The inbound proportional rate to Kankakee—as an integral part of the through rate—was defined by one of appellants' own witnesses, as follows:

> "• • • The 5½ cent per hundred rate that has been referred to here is not actually a 5½ cent rate to

> Kankakee or Chicago. It is conditioned on the grain moving east, and our experience in the early part of the application of this rate was that it had to be milled in transit, and it had to be moved to trunk line territory, eastern seaboard territory. So really what we should be talking about, what is the cost to get grain to New York City, which is a representative point in the trunk line territory, by these various competing lines." (R. 756)

Section 4 (1) of the Act prohibits a common carrier from charging or receiving

> "any greater compensation in the *aggregate* for the transportation of * * * like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance * * *: Provided, That upon application to the Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances * * * but in exercising the authority conferred upon it in this proviso, the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory * * *."

In view of the plain and unequivocal language of the statute above quoted, the Commission properly held that the 6¢ proportional to Kankakee

> "has no independent existence, but is an integral part of the rate which applies on the through transportation from Belt origin, through the milling-in-transit point, to delivery of the corn product at its ultimate destination." (R. 25)

In decisions of the Commission in other cases, extending back almost to its very beginnings, it has been repeatedly held that, in determining whether or not a fourth section departure exists, the aggregate charges for the transportation from point of origin to final destination must be con-

sidered and not a segment thereof. *Sheldon Axle & Spring Co.* v. *Lehigh V. R. Co.*, 53 I.C.C. 43, 44; *Board of Railroad Commissioners* v. *Atchison, T. & S. F. Ry. Co.*, 34 I.C.C. 111, 113; *Detroit Board of Trade* v. *Grand Trunk R. Co.*, 2 I.C.R. 199, 202.

C. The Rates Involved Are Reasonably Compensatory

1. Liberal earnings yielded by the all-rail rates.

The record indicates that the major portion of the corn transported under the fourth section rates moved to the Kankakee elevator of General Foods Corporation for milling and subsequent reshipment to destinations in the East. Data introduced in evidence by a witness for that company showed that on all shipments made in the first eight months of 1957, the weighted average earnings were $448.42 per car and 50.69 cents per car mile for an average weighted distance of 884.7 miles from all origins to all destinations. Shipments of the Indianapolis shipper (Evans Milling Company) were likewise shown by its witness to have produced revenue of $407.38 per car and 61.62 cents per car-mile for somewhat shorter hauls from Belt origins to eastern destinations, the average weighted distance having been 661 miles. (Ex. 28, R. 582; Ex. 26, R. 564)

The earnings cited above compare favorably with the average revenue of the Central and all Eastern railroads on all freight traffic. The average freight revenue per car-mile on all traffic handled by the Central was shown to be 48.015 cents, and for all 53 railroads in the Eastern District, 50.854 cents. The average hauls which produced the latter earnings were only 236.58 and 196.68 miles, respectively. (R. 152) Notwithstanding that average distances on all freight traffic are materially shorter than those here involved, and the well-recognized principle that the longer the haul the lower the revenue per mile (*Harvard Co.* v. *Pennsylvania Co.*, 4 I.C.C. 212), the

earnings derived from the fourth section rates are appreciably higher. Appellees cited many decisions of the Commission in fourth section cases, in which relief was granted on a showing of much lower earnings than those indicated here. *Dried Beans to W.T.L. and Ill. Territories,* 298 I.C.C. 527, 529; *Ethylene from Orange, Texas,* 299 I.C.C. 61, 63; *Iron and Steel Billets to Cleveland,* 296 I.C.C. 103, 105; *Coal from Western Trunk Line and Southwest to Twin Cities,* 293 I.C.C. 71, 77. The following language from the Commission's report in the case last cited, is pertinent here:

> "The proposed rates, as stated, would yield minimum revenue of 31.4 cents a car mile over routes in excess of 800 miles. The record is convincing that they would be reasonably compensatory. The *rates are vitally important to the affected coal mines, and essential to the recovery by the railroads of some of the traffic which has been lost to rail-barge competition.* Clearly, the proposed rates are not lower than necessary to meet the competition, and there is no substantial evidence that they would constitute an unfair competitive practice." (emphasis supplied)

2. Rate comparisons

The railroads also showed that the rates in issue were materially higher than export rates in effect from the same origins west of Kankakee to points in the East. For example, the rate to New York exceeds the export rate to that city by 5 cents per cwt., and to Boston by 7 cents per cwt. (R. 23) The Commission has frequently held that there is no reason under the statute why domestic rates should be any higher than export rates. *Oklahoma Millers Asso.* v. *Alabama & V. R. Co.,* 102 I.C.C. 1, 2; *Import Iron & Steel from Gulf Ports,* 115 I.C.C. 373, 375. The sufficiency of the export rates is unquestioned here.

The Docket 28300 first class rates prescribed by the Commission after long investigation were shown to be fre-

quently employed in other cases to test the compensativeness of grain rates, *e.g., American Barge Line Co.* v. *Alabama G.S.R.Co.*, 306 I.C.C. 167. The railroads showed that the combination through rates involved here reflect averages of 14.4 and 13.1 per cent, respectively, of the first class rates referred to from the west end origins to Eastern points on the one hand and from Chicago on the other. (Ex. 16, R. 305) Applicants also compared the percentage relationship of these fourth section rates to the same Docket 28300 first class rates with that of rates on grain approved by the Commission in *Export Grain, Ex Lake from Buffalo to New York*, 292 I.C.C. 647. The instant rates were shown to be from 12.3 to 17.9 per cent of first class while those approved in the case cited ranged from 6.3 to 9.5 per cent of the class rates. (R. 306, Ex. 17)

3. The 6¢ proportional produces more than its share of the through revenue

In their showing of revenues produced by their shipments, the Kankakee and Indianapolis shippers indicated that, for the initial movement to Kankakee on the inbound proportional, the former's shipments yielded $66.07 per car and $1.685 per car-mile from all origins for average weighted distance of 39.21 miles, while those of the Indianapolis firm from all origins to Kankakee produced revenue of $59.42 per car, and $2.38 per car-mile for an average weighted haul of 24.95 miles. (Ex. 27, R. 581; Ex. 26, R. 563)

It will be noted from the data as to the through shipments previously stated herein and those cited above, that while the *average distance to Kankakee was but 4.4 per cent of the entire haul*, the inbound proportional *accounted for 15 per cent of the through charges* on the Kankakee processor's shipments, while on the Indianapolis shipper's movements the inbound factor to Kankakee produced 14.5

per cent of the aggregate revenue although involving less than 4.5 per cent of total haul.

D. The Competitive Rail Rates Have Increased the Net Revenues of the Railroads.

The argument (Mechling brief, pp. 27-30; Government Brief, p. 34) that the reduced rates did not increase the revenues of the applicant railroads is made in disregard of the evidence.

During the years when unreasonably high rates prevented the rail movement of this corn to eastern destinations, the transportation services necessary to move corn from the origin area to Kankakee was complex and exceedingly costly for the railroads. Instead of being trucked a mile, or two, or five, from farm to a railroad elevator, corn had to be trucked as far as 40 miles to a river elevator. Union Hill, the largest shipping point on the Belt, is only 14.6 miles from Kankakee, but 31 to 36 miles to the nearest river elevators, so that when corn reached the river it was more than twice as far from Kankakee as it was at the starting point. After a barge haul to a Chicago elevator, the corn was loaded into a railroad car and switched to the New York Central by one or more switching roads, at an average cost to the Central of $23.10 per car. (Ex. 14, R. 304-305)

The outbound movement of this ex-barge corn by rail for the 75 mile haul from Chicago to Kankakee involved handling in and through congested and costly Chicago terminals and a transfer at Schneider from the Danville branch to the Belt. The complexity of this movement was detailed by the railroads' operating witness (R. 400-403) who epitomized his testimony concerning it, as follows:

> "However, on corn originated at Chicago, there are numerous inter-train, intra-train and interchange switches involved, all of which make that a more difficult operation than the Kankakee Belt movement."

The handling of traffic on the Belt under the competitive rates was detailed by the same witness, and shown to be a simple operation involving no additional train service or special services. (R. 405-408) In an earlier case, involving a local rate from Kankakee and handling on the Belt (*Corn Grits from Kankakee*, 237 I.C.C. 413, the Commission pointed out that the rate applied

> "over a route of low traffic density, over which the traffic could be handled without additional train miles, as contrasted with the present joint rates from producing points in northern Illinois and Indiana to Battle Creek which apply over a longer route of high traffic density through Chicago * * *."

The railroads' traffic witness showed that the railroads now have additional revenue of $80 to $85 per car (for the through movement) over that previously received for handling ex-barge corn via Kankakee. An additional advantage is that the weighted average haul to Kankakee is only 38 miles, as compared with the haul of 75 miles from Chicago. The connections of the Belt are also benefited by receiving shipments at interchange points on the Belt east of Kankakee, since it substantially reduces the length of the haul that otherwise would be required from Chicago, and avoids interchange and complex handling in the congested Chicago district.

The statement in the Mechling brief (p. 29) that all barge corn received at Chicago goes "east by rail, and applicants would have the revenue from the reshipping rate in any event "is incorrect. During 1956, Chicago received 98,037,000 bushels of corn via all modes of transportation and from all sources, including 26,210,000 bushels by barge. The total outbound movement by rail to all destinations in every direction was 37,125,000 bushels, of

which 23,748,000 bushels moved east, leaving 60,912,000 bushels of the total receipts for movement on the Great Lakes and local consumption. (Exs. 44, 45, R. 796-797, 835)

Mechling implies that the Belt should not compete with the river for this corn, (even though the Belt and appellee elevators had been operating for many years before the advent of barge transportation on the Illinois River) so that the barge lines and the river elevators might again have a monopoly in the purchase and shipment of corn.

E. Evidence Relied On By Appellant Mechling Does Not Show That the Rates Are Not Reasonably Compensatory

To meet the requirements of the statute, the applicants offered a great deal of evidence showing that the rates in issue were reasonably compensatory. Nowhere in these proceedings has it been contended by parties opposing the granting of such relief that the "aggregate" compensation, with which Section 4 is concerned, is not compensatory, and Mechling (on p. 22) seemingly concedes it.

Appellants on the other hand submitted no evidence bearing upon the question of reasonable compensativeness of the through charges, but argue that the 6 cent factor to Kankakee is too low based on a study purporting to show costs from Belt stations to Kankakee (Mechling brief pp. 8, 20, 30); (Government brief pp. 13, 14). It is there argued that a higher cost was shown for moving corn on the inbound proportional to Kankakee than the amount of the rate. The study, however, is not based on actual operations or statistics of the Belt (R. 606) but, as indicated in the Commission's report (R. 25), is a study of average costs (1) of the New York Central System (a vast net-work

of lines spread over the eastern half of the United States from St. Louis and Cairo, Illinois to the Atlantic Seaboard and projected into southern West Virginia and Canada); and (2) of territorial average costs of all eastern district railroads, which serve the same and additional areas in the middle Atlantic states and New England, including many great cities like Philadelphia, Baltimore, Washington and Norfolk, not reached by the Central. Just how such average costs covering, among others, expensive tunnels and bridges, mountains to be crossed, car floats, piers, wharves, huge warehouses, stations, valuable rights of way in large cities, etc., have to do with the cost of performing what the record shows is a very simple service over level terrain in the rural area between Moronts and Kankakee, is not made to appear. As well average the hut of Caractacus with the marble palaces of Rome, or learn the taste of rabbit with a one horse-one rabbit recipe. However, even if it were possible to obtain proof of the actual cost of moving corn to Kankakee, which these appellants emphatically deny, it would still be without probative value here because, as the Commission stated, (R. 25) "it deals only with the inbound proportional" and the statute explicitly requires consideration of the aggregate charge.

The statement (Mechling brief, p. 32) regarding

> "* * * the Commission's casual finding that, although Mechling had fully distributed costs approximately 10¢ per cwt. less than those of the NYC,"

is a distortion of the language in the Commission's report. What the Commission said was:

> "*According to Mechling,* this difference of 10 cents represents its inherent low cost advantage which must be preserved." (R. 26)

The evidence relied on by applicants in this case was voluminous and substantial, and of the kind ordinarily submitted in fourth section cases. The language quoted also presupposes that railroad costs are ascertainable just as are the costs of a gas or power company, or a barge line. Regardless of the amount expended for such an undertaking, it would in final analysis be nothing more than an average of system-wide or territory-wide statistics covering the vast and widely divergent area between the Atlantic Ocean and the Mississippi River, with all the variables and assumptions it would entail. Since the Government's brief, in this connection, deals only with a very minor portion of the entire haul, the cost study it has in mind for the railroads would also probably be limited to that factor alone. Its criticism of the applicants for not having made a cost study would seem to imply that it, too, has little faith in the one introduced by appellants.

After stating on page 35 of its brief:

> "Although it may well be true that the rail carriers reduced their *losses* by encouraging transportation from Belt origins to Kankakee in place of shipments from Chicago to Kankakee (after carriage by barge from the Belt origins) * * *

the Government says in the footnote thereto:

> "The argument assumes that all the corn being transported along the Belt under the proposed rate would otherwise have been shipped to the East via Kankakee. The record fails to support this assumption."

The reference to "losses" and "loss" is repeated on the following page, but the witness said nothing about losses. *Per contra*, it was stated that the amount named was "additional" or "added" net revenue. (R. 305) The

statement in the footnote is also incorrect, for out of a total of approximately 1900 cars of free corn moved from origins on the Central only 20 cars moved to Chicago (R. 384) and there is nothing in the record to indicate that any of them moved east, or moved on the competitive rail rate. The saving (in addition to that noted above) results from transporting traffic to the East via a direct route instead of sending it over a circuitous and costly barge-rail route through the congested Chicago district.

F. The Rates Are No Lower Than Necessary

1. Rates are no lower than is necessary to meet barge-rail competition

The suggestion (on p. 13 of the Mechling brief) under the foregoing caption that

> "* * * the 5½¢ rate was much more of a reduction than was required to meet water competition and would in time eliminate water competition from the area."

is entirely without foundation in the record.

It is conceded by the barge interests and their shippers that substantially all of the corn grown along the New York Central had been attracted away from the railroad to river transportation in the period between the improvement of the Waterway and the taking effect of competitive all-rail rates to the East. (R. 795). The latter were made effective after consultations with elevator operators, corn processors, and other potential rail shippers, but only after full consideration of the rates by all Eastern and Illinois railroads under procedures sanctioned under Section 5a (49 U.S.C., Sec. 5b). The proposal was publicized to "all the shipping trade" but not one opposed it before those rate committees. (R. 368)

The competitive rates did not return to these rail elevators, or to the railroads, all of the corn that had been

attracted away from them for river transportation, nor was it expected that they would. The rate advantage of the competing barge carriers has been too great, and the fields from which corn can be drawn for rail movement too restricted. The new rates produced not a single carload of corn from some stations, such as Moronts which is located on the river, and the record contains examples of trucking corn to the river for 20 miles and more from towns on the Belt and other nearby locations. (R. 649-650, 707, 711)

Statements made in appellants' briefs concerning the drastic effect of the revival of railroad competition from stations west of Kankakee are entirely without foundation. While the competitive rates did result in returning several hundred cars of corn that had been lost to the river, the important and undeniable fact is that barge shipments, from the ten competing ports in the origin area involved, also increased substantially during the period in 1957 when the competitive rail rates were in effect.

The record is replete with examples of the advantage which barge transportation has over rail movements from this territory, due to lower transportation charges and the ability of the great Chicago grain concerns to influence the flow of corn to their elevators at the competitive river ports.

Despite overwhelming proof to the contrary appellants persist in asserting that the 6-cent rate is lower than necessary to meet competition (Mechling brief, p. 37) The alleged drop in river elevator receipts and the persistently higher bids at Belt elevators than at river elevators are purely imaginary. The difference in bids, results from the river buyer's practice of buying grain f.o.b. on truck at the river whereas grain for rail shipment is bought f.o.b. on cars at point of origin. Unloading corn from truck to elevator and elevating it into box cars is no different than

the operation of getting corn from truck to barge at the river. (R. 525-526)

The appellants' testimony as to an alleged decline in tonnage at river elevators covered only three of the ten ports in the competitive area, namely, Morris, Ottawa, and Spring Valley, but even the volume handled at those ports shows no drastic drop in 1957 from 1956, as is indicated by the following data from Exhibit 19 (R. 307):

1956 (bushels)	1957 (bushels)
8,380,465	8,327,464

The slight difference of sixty-three one-hundredths of one per cent (0.63%) could have been due to the transfer of tonnage to one of the new elevators which had been built at Seneca and Lockport just before these rail rates were published (R. 746-747) or to an established river elevator at one or more of the other ports. If it were in fact lost to rail transportation, the difference is so infinitesimal as to be lost in the very substantial increase in barge tonnage to Chicago from all ten competing ports.

Mechling's claim that these rail rates are lower than necessary to meet barge-rail competition is negated by the following cogent facts:

(a) Shippers who are now using the fourth section rates for a portion of their corn requirements (but who also have continued to buy ex-barge corn in substantial quantities) have made it plain in their testimony that they will not ship corn on the fourth section rates if there is any increase whatever in the rates. (R. 527-528)

(b) The present rail rates have failed to attract any of the corn from some nearby fields which for years has been trucked past the Belt's shipping facilities for long distances to the river. (R. 707, 700)

(c) A large part of the corn that has been shipped by rail originated at Union Hill and other points near Kankakee and at some distance from the river. Moronts on the river was unable to attract any shipments for all-rail movement. (R. 378, Ex. 13)

2. River buyers are able to outbid the all-rail shippers

The statement (on p. 11 of the Government's Brief) that rail buyers are able to outbid grain dealers shipping by barge is contrary to the evidence of record and the Commission's finding.[5] Conceivably the Government misunderstood the evidence. The record shows that during the years when high rail rates gave river elevators a monopoly of the corn grown along the Belt, their bids to the farmer were made on the basis of the Chicago price less the transportation cost to Chicago. The amount deducted for transportation, however, was not the actual shipping cost, *i.e.*, the barge charge of 4.625 cents per cwt., but the "Illinois proportional" a "paper" rail rate ranging from 16½ to 23 cents. This fictional device, while profitable to the river buyer, was unfair to the farmer selling the corn. When the reduced rail rates to the East enabled rail buyers to enter the bidding for this corn, their bids reflected the actual transportation charge and not a concealed profit for themselves. As a result the farmer began to receive 3 or 4 cents per bushel more than he had been getting from the river buyer. This may have led to the Goverment's misunderstanding of the situation. When the river buyers learned that farmers were getting more for their corn they immediately raised their own bids to a level higher than those of rail buyers, and the Commission so found in its report. (R. 17)

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[5] Rivers buyers make their bids f.o.b. trucks at river elevators whereas rail buyers' bids are made f.o.b. in box cars, that is, after corn has been unloaded from trucks in rail elevators and elevated into railroad cars at the farmers' expense. (R. 15)

G. The Commission is Not Required in a Fourth Section Investigation to Decide the Lawfulness of Rates Under Other Sections of the Act

Section 4(1) provides

> "* * * That upon application to the Commission and after investigation, such carrier, in special cases, may be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property, and the Commission may from time to time prescribe the extent to which such designated carriers may be relieved from the operation of the foregoing provisions of this section, but in exercising the authority conferred upon it in this proviso, the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and no such authorization shall be granted on account of merely potential water competition not actually in existence * * *."

There is nothing in the language above quoted which places upon the Commission the burden of determining the lawfulness of the rates under other sections of the Act. Section 4 (1) forbids the granting of relief where the charge to or from the more distant point is not reasonably compensatory, and also where relief is based on potential water competition not actually in existence. If a special case has been shown, there are no other requirements, and no other restrictions upon the Commission's authority to grant relief, as this Court held in *United States* v. *Merchants & Manufacturers Traffic Association*, 242 U.S. 178, 188. See also *Seatrain Lines, Inc.* v. *United States*, 168 F.Supp. 819, 824; *Koppers Company* v. *United States*, 132 F. Supp. 159; and *Florida Citrus Commission* v. *United*

States, 144 F.Supp. 517, where the Court in each instance adhered to the holding of this Court in the *Merchants & Manufacturers* Case, *supra*. The *Intermountain Rate Cases*, 234 U.S. 476, cited by appellants, involved the preference of shippers at the more distant points and discrimination against shippers at intermediate points, which are prohibitions expressly declared in Section 4.

Appellants were advised by the Commission on several occasions prior to the hearing in this case of their right to present for determination in investigation or complaint proceedings the issues outside the scope of Section 4 which they desired to raise. Thus, appellants were fully advised several months before the hearing that the issues would be limited to those arising under Section 4 of the Act, but chose to disregard the Commission's delineation of the scope of its investigation in this case. Appellees and, presumably, the public at large relied on the Commission's pronouncement that the only issues involved were those under Section 4.

H. There Is No Discrimination

Appellants and the Government patently misconceive the scope and purpose of Section 3(1) of the Act as it applies to the facts in this case. The Commission properly found that no discrimination results from the rates here involved, as they apply via Chicago and every other point in official (Eastern) territory, and Chicago has the "same stature" under the tariffs as all other points. (R. 27) What the Board of Trade proposed, and the Government supports in its brief, is not "equality" but new and extraneous tariff provisions which, if established, would create "discrimination, favoritism and inequality" in favor of Chicago. The facts of record and the decisions, as we shall demonstrate, give no support whatever to appellant's contentions.

1. The milling-in-transit requirement in the Fourth Section Tariffs.

The Board of Trade states (p. 12) that its "major contention" is

> "that the milling-in-transit requirement discriminated against Chicago by restricting the reduced rates so that they would not apply on whole corn, thereby excluding Chicago grain interests from the source of supply of corn along the Kankakee Belt line and making it a private buying preserve for the Kankakee processors and a few other processors who could route their corn through Kankakee."

While it might be inferred from the language quoted that the restriction in the tariffs against whole corn only applies to Chicago, the fact is that no whole corn rates are published in the tariffs and no fourth section relief was sought with respect to them. Since there is absolute equality of treatment as between all shippers, the charge of discrimination cannot be sustained. As the Board of Trade's proposal would involve the establishment of new rates a different commodity application and a new fourth section application to cover them, the Commission properly held the matter was one for a separate proceeding.

While, ordinarily, a manufactured product carries rates no lower than the raw product from which it is made, there are exceptions to the rule. For example, this Court said with respect to rates on live stock which were higher than those on meats, (*Interstate Commerce Commission v. Chicago G. W. Ry. Co.*, 209 U.S. 108)

> "that a rate on the manufactured article is not necessarily an undue and unreasonable discrimination because it is lower than the rate on the raw material."

Other examples of lower rates on manufactured articles than on the raw materials from which they are made, that have been sanctioned by the Commission are: peanut oil v. peanuts; sheet metal work v. sheet metal; castings v. ingots; dressed poultry v. live poultry. *Houston* v. *S. P. Co.*, 49 I.C.C. 316, 318-9; *Dahlstrom Metallic Door Co.* v. *E. R.R. Co.*, 55 I.C.C. 402, 406-7; *Pacific Coast Steel Co.* v. *Director General*, 62 I.C.C. 207. In *Crown Willamette Paper Co.* v. *D. G.*, 78 I.C.C. 273, 277 and *Minnesota & Ontario Paper Co.* v. *D. G.*, 93 I.C.C. 105, 108, involving higher rates on wood pulp than on paper, the Commission stated that although it has condemned rates on raw material higher than on products manufactured therefrom, that *fact in and of itself does not demonstrate that higher rates on raw materials are unreasonable.*

The cases cited indicate that the question of relationship of whole corn rates to milling-in-transit rates must be determined in the light of all the circumstances and conditions surrounding them and, as such, is one calling for the exercise of the Commission's rate-making powers. The tariff rates in this case were published by the railroads in the exercise of managerial discretion, after consultations with various shippers (R. 299) to determine what rates would be required to secure some traffic for a line which, for lack of business, was threatened with abandonment. (R. 409) The rates were established and made available to all shippers everywhere and they have unquestionably had the effect of returning to the rails some of the traffic that had been lost to the river. In the case of whole corn it seemed to be the judgment of management, based on their experience with barge competition in this area, that a reduction in whole corn rates would not return any significant portion of the traffic lost to the river.

It will be helpful to examine the background of the competition between the barge-rail and all-rail routes to properly appraise the validity of the Board's contentions. Its chief witness, in his testimony, stressed the "tremendous investments" its members have on the river, and that its "real interest is in grain that comes in by barge." (R. 796, 797) An enormous volume of corn is received in Chicago annually by water and rail which may be shipped as whole corn under provisions of the Chicago tariffs. (R. 310)

During all the years since the Chicago interests built their own elevators on the river, and while the Belt was on a starvation diet with nothing more than a few cars of Government export corn to handle, the Chicago interests evinced no interest whatever in using its services. The railroads published rates to meet the competition of barge-rail routes but the Chicago interests have ignored them, notwithstanding there are many large and important corn processors in the Chicago district (Ex. *23*, R. 757) and many others at points throughout the East to whom Chicago could sell corn on the fourth section rates. (R. 770, 773, 782). In these circumstances it seems logical to assume that the Board's inveighing against the applicants' milling-in-transit arrangement is more for purposes of harassment than any eagerness to use whole corn rates from Belt origins. It is unreasonable to suppose that the Chicago interests, with their own river elevators in the area, and unrestricted tariffs could be persuaded to divert their tonnages from their own facilities to the Belt elevators for rail transportation simply because the railroads had provided rates on whole corn. Especially, when today shippers will pass elevators on the Belt and truck corn 20 miles further to the river to avail themselves of lower barge charges. The Board's reference to "excluding Chicago

grain interests" and "private buying reserve" is ironic and absurd.

The statement (p. 12, footnote, Board of Trade's brief) that the Commission's finding that no discrimination results from the assailed rates has nothing to do with the milling requirement is erroneous. In a single paragraph, beginning with the words "The Chicago Board of Trade and others raise certain issues, principally discrimination against whole corn by the milling in transit limitation * * *" the Commission treats with all of the Board's proposals. The Commission's finding that there is no discrimination appears in the concluding sentences of the same paragraph, as follows:

> "However, since the proposed rates are effective over Chicago, *that point has the same stature as all other corn processing points in official territory in their application.* Moreover, the routes over Kankakee are the same as they were for many years prior to the establishment of the proposed rates, and while limited in their scope as compared to making the inbound rate break on Chicago, there is no indication of undue damage to Chicago." (R. 26).

Under the circumstances it cannot be gainsaid that the finding that "Chicago has the *same stature* as all other corn processing points in official territory" is equivalent to holding that the fourth section rates "secure equality of rates as to all" and result in no favoritism, discrimination, preference or prejudice.

Since the Board of Trade's proposal involves no discrimination and whole corn rates are outside the scope of the tariffs and the carriers' application for fourth section relief, the Commission properly held that such new and extraneous matters were not proper subjects for consideration in this case.

2. Routes via Chicago are available to all shippers

While statements made in the briefs filed by appellants and the Government in this case would indicate that a member of the Board of Trade buying corn on the Belt and shipping it via Chicago to Eastern destinations would be subject to some penalties or other unequal and disadvantageous treatment, or that other shippers or localities are accorded different and more favorable treatment, there is not the slightest basis for their contentions. Routing from Kankakee and Chicago under their respective reshipping rates is the same as it has been for 35 years. The fourth section tariff made no changes from either point. (R. 320, 825) The tariffs apply equally and impartially to all.

3. Restriction of transit privileges.

In the case of transit privileges, as well as in the matter of whole corn rates and routes, there is no restriction in the fourth section tariffs that does not apply uniformly to all shippers and locations. The Board of Trade's assertion that there is discrimination is wholly unfounded. While reference is made several times in its brief (*e.g.* pp. 5, 7) to the limited number of articles in applicants' list of corn products as compared with those available under other tariffs carrying rates to and from Chicago, there are 27 such products listed in the governing tariff (R. 122) including such items as corn dust, corn meal, grits and animal and poultry feed.[6] The tariff list in-

[6] Corn flakes were casually mentioned by appellants during the hearing, but the specification for "flaked corn feed" in the tariff carries the restriction "not a cereal food preparation and not for human consumption." (R. 216)

cludes every corn product named in Ex. 63 of the Board's witness. (R. 818) The record does not indicate what additional products are listed in tariffs that are available to Chicago shippers, but if they are more comprehensive than those in the fourth section tariffs, it constitutes another advantage enjoyed by Chicago that is not afforded to any users of the fourth section rates—anywhere.

4. That the combination rates make on Kankakee and not on Chicago do not constitute discrimination against Chicago

The failure of applicants to publish the 6-cent proportional to Chicago does not constitute discrimination, as contended on p. 7 of the Board of Trade's brief. There is no more reason for adding Chicago as a rate-break point than there would be to add Danville or any other station beyond Kankakee. So long as the through charges on shipments moved via or through Chicago do not exceed those on the traffic moving via other points it has no just cause for complaint. *Schenley Industries, Inc.* v. *Akron, C. & Y. Ry. Co.*, 277 I.C.C. 699, 708; *Iron and Steel to Iowa*, 263 I.C.C. 361, 401.

The average weighted distance to Kankakee for shipments moved under these rates was 38 miles; to Chicago over the traveled route the distance would be 113 miles. While the Board of Trade would make the 6¢ apply to Chicago for the longer distance, the Mechling group of appellants and the Government are here contending that the proportional is too low—even for the short haul to Kankakee.

I. Discrimination Against Connecting Barge Carriers at Chicago.

At p. 12 of the Mechling brief, it is stated that on corn moving through Kankakee and over the circuitous route via Chicago to the East at the Kankakee reshipping rate of 49.5 cents, the New York Central would receive 13 cents as its division of such rate to Chicago, and the carrier from Chicago to New York City would receive 36.5 cents, while on a movement of corn products milled from ex-barge corn from Chicago to New York, the rail line would receive the Chicago reshipping rate of 49.5 cents. It is contended that this is a discrimination against barge carriers.

Appellants' argument overlooks the fact that Section 4 appertains to direct routes, and that the reshipping rate from Chicago and the reshipping rate from Kankakee are equal in amount. If a shipment off the Belt is sent to an Eastern destination via the circuitous route through Chicago instead of the direct routes from Kankakee, the situation is precisely the same as when ex-barge corn is consigned to the East via the circuitous route via Chicago through Kankakee. From Kankakee, the same as from Chicago, a portion of the eastern reshipping rate must be paid to a carrier or carriers for the extra carriage in such routing though out of line points. Frequent reference has been made in this case to the fact that the Chicago reshipping rate of 49.5 cents to the East on ex-barge shipments also applies via Milwaukee, Wis., and conversely the reshipping rate of 49.5 cents from Milwaukee applies via Chicago (Ex. 57) so that when circuitous routes are used it invariably presents the same divisional aspects as from Kankakee versus Chicago and Chicago versus Kankakee. It would be impossible to apportion between carriers

parties to a circuitous route the same revenue as would be received by those forming the direct route.

This witness also testified that the purpose in establishing these competitive rates was to move the corn over the direct routes east of Kankakee (R. 320-321) and substantially all of the traffic has been handled in that way.

J. Rates Do Not Violate the National Transportation Policy

It is asserted in the briefs of the Government (p. 30) and Mechling (p. 35) that the Commission erred in not taking cognizance of the National Transportation Policy (49 U.S.C. Note preceding Section 1) and failing to protect the inherent advantage of water transportation.

In former years, the Belt originated substantially all of the commercial corn produced in the vicinity of its rails. With the development of the Waterway some 20 years ago, this tonnage was diverted to the river. Between 1935 and 1957, the river movement to Chicago increased from 700,000 to 34,000,000 bushels, while the Belt's tonnage almost entirely disappeared. The competitive rates established on December 15, 1956 resulted in the return of a portion of the Belt's lost tonnage, but the tonnage handled by the barge lines increased substantially in the same period. Mechling (p. 39) says this increased barge tonnage was slight, but an increase of 91,563 tons between Dec. 15, 1956 and August 30, 1957, when competitive rates were in effect from Belt stations, can scarcely be so regarded. Stated in bushels, it amounted to 3,269,715, and was 22.7 per cent in excess of the amount handled during the corresponding period in the previous year. In its report the Commission referred to the increase in barge tonnage and found from its review of the evidence that

the all-rail rates are not lower than necessary to meet the barge competition (R. 28)

In disposing of Mechling's demand that rail rates be held up to protect barge traffic, the Commission said:

> "The barge carrier is not entitled under the act to have its rates protected from a competing mode of transportation, where, as in this instance, the railroads' efforts to secure traffic do not amount to destructive competition."

The Commission's findings fully conform to the National Transportation Policy. The Transportation Act of 1958 provides that in cases involving competition between carriers of different modes of transportation, the Commission, in determining whether a rate is lower than a maximum reasonable rate, shall consider the facts and circumstances attending the movement of the traffic by the carrier or carriers to which the rate is applicable; and that rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the National Transportation Policy declare in the Act. [49 U.S.C.A. Sec. 15(a)3]

In their brief the railroads discussed at some length the decisions upon which appellants and the Government rely, clearly distinguishing such cases and the facts and issues they presented from those in this proceeding. They also cite a number of other cases, which are apposite and fully support appellees' contentions and the lawfulness and propriety of the Commission's report and order.

By "protecting the barge lines' inherent low cost advantage" appellants (Mechling brief, p. 33) mean the complete elimination of rail competition so they and their

shippers may again monopolize not only the transportation of corn but dictate the price to be paid for it to the farmer. The evidence unmistakably reflects the advantage which barge lines now have over the Belt in attracting corn that is contiguous to the railroad. While buyers for rail shipment are confined to an area within 5 or 6 miles of rail elevators, the large Chicago grain firms with elevators along the river can reach out as far as 40 miles. Long before these rail rates were made effective, corn buyers at other inland points were trucking for long distances to the river from fields located within short distances of Belt stations, and have continued to do so since the all-rail rates were put into effect. In once such instance, off-line traffic, though originating only ¾ of a mile from the Central at Dwight was trucked (at a cost of 4 cents per bushel) past the latter's shipping facility for a distance of 20 miles in order to benefit by "the inherent low cost advantage" of barge transportation. (R. 649, 653)

Essex, although 28 miles from the river and only 7 miles from the Belt (R. 706); Wenona, with similar distances of 24 miles and 4½ miles, (R. 668); Gardner, 19 and 4½ miles, (R. 699-700); Kerner, 18 and 3 miles, respectively, (R. 657-658) are a few of a number of cases exemplifying the disadvantage of railroad transportation from this area. It was observed by appellants' counsel in the record (R. 333) that the "great preponderance" of the free corn moved all-rail originated at only three stations at the eastern end of the origin area, where trucking distances to the river are longest.

In considering the question of carrier competition, it should be noted that the mills at Kankakee and Indianapolis, which account for the great preponderance of the rail

movement involved, have nevertheless continued to receive ex-barge shipments.[7]

The Kankakee witness testified that he is buying "well over a million bushels" annually from Chicago merchant elevators. (R. 543)

Mechling's statement (p. 18) that the Commission refused to consider the disruption of the equality of competitive opportunity for all elevators in the area has no application or significance here. Prior to the publication of rail competitive rates there was no "competitive opportunity." The corn simply went to the river. The railroads were limited to the handling of a few cars of C.C.C. corn for export, the elevators on the Belt were closed and the activities of their owners restricted to local retail sales and buying corn to be trucked from farm to river elevator. What appellants seek is not "equality of

---

[7] The Indianapolis witness testified on cross-examination as follows:

"Q. Do you know about what proportion of ex-barge corn you have bought since December 15, 1956 and excluding the period that the temporary restraining order was in effect as compared to a like period in previous years?

A. I don't believe I could tell you any relationship one versus the other.

Q. So far as you know the purchase of the ex-barge billing was an isolated purchase then?

(Footnote continued)

A. No, I wouldn't say that. We bought considerably more grain which was transported by barge to Chicago. I say *we have bought considerably more grain which was transported by barge* to Chicago *than we have been able to get off the New York Central.*

Q. *Since the five and a half cent rates was in effect?*

A. *At any time, before and after.*

Q. Are you talking now about grain or corn specifically?

A. We only deal in corn." (R. 575)

competitive opportunity" but the monopoly they formerly enjoyed.

The Mechling brief (p. 40) also misstates the testimony of the Marseilles witness, who is located on the river and also on the Rock Island Railway, about 25 miles from the Belt. All of his corn is shipped on the river. (R. 684) The witness's lack of interest in rail transportation was thus stated:

> "Well, as it now, our rail rate, we don't have any interest, don't amount to anything. It is our river rate takes care of everything." (R. 685)

On cross-examination, he testified as follows:

> "Q. Did you lose any customers to New York Central elevators last year?
>
> A. Not that I know of particularly, no.
>
> Q. Was your business as good last year as it was the year before?
>
> A. I should say just about the same."
>
> • • •
>
> Q. How close to the New York Central do you get when yo uare at the most southern point of the area from which you draw corn?
>
> A. About six miles. (R. 686)

It will, therefore, be seen that the Commission's conclusion finds full support in the record.

Appellants likewise distort the testimony of Witness Noder, who operates the McNabb elevator on the Belt (not Granville, as appellants state) which is located 12 to 14 miles from the nearest river elevator. (R. 489, 495) This witness testified that during the injunction period the only rate available to him "was so high you just couldn't touch any corn going out of McNabb by rail. I know that." (R. 493) The witness's actual testimony on cross-ex-

amination, regarding a shipment of corn to the river "that was grown within a mile of the river elecator" was as follows:

> Q. Have there been other such instances (of barge shipments) in your experience before the 5½ cent rate went into effect?
>
> A. No, that was, as I remember that would be the only free corn that I had shipped in years that wasn't applied to the 5½ cent rate.
>
> Q. In other words, the 5½ cent rate except in such instances when the river services for some reason were inadequate or unable to take it has been entirely moved off the river and on to the railroad by the 5½ cent rate for free corn.
>
> A. Without it was located real close to the river, yes, I'd say you were about right.
>
> Q. Well, what do you mean by real close to the river?
>
> A. Well, I buy some corn that the hauling would prohibit moving it from its location to our elevator, *not very much, but I do get a little.*
>
> Q. And how close to the river—
>
> A. Would that corn be?
>
> Q. Yes.
>
> A. It would be raised within a mile of the river elevator." (R. 494-495)"

It is impossible to understand how appellants could distort the foregoing testimony into the statement that **"the only corn in his area going to the river elevator was grown within a mile of the river elevator."**

There is likewise no support in the record for the following statement in the Mechling brief (p. 41):

> "Many witnesses testified that farmers were slow to learn of the higher prices at the Belt elevators and slow to break established patterns. These experienced elevator operators were sure that the diversion to the

Belt would increase in the future as the 5½¢ rate became more widely known and appeared to gain more permanence with the passage of time. They knew their business and were true prophets."

No record reference is given for the language quoted above. It is contrary to the evidence in this case and does little credit to the business acumen of the corn belt farmer to say that, after the river buyers' monopoly had been broken and competitive buying by rail shippers had resulted in increasing bids for corn as much as 3 and 4¢ per bushel, and he no longer was forced to accept identical bids made by several river elevators at different locations "just about all the time" (R. 498), the farmer would have been slow to learn of the higher prices. The Cargill witness testified that people in the country "find out pretty quick where is the best place to sell corn" (R. 768) and another witness for appellants referred to advertising by a rail elevator of certain of its products in three small rural papers, in which it was also stated that his rates had been lowered. Many others testified to demands of farmers for higher prices because of the increased bids of rail buyers. (*e.g.* R. 676-677, 665, 698)

Mechling contends (p. 14) that because the barge lines are able to draw grain as far as 40 miles from the river and the railroad is restricted to corn grown within 5 or 6 miles of its stations, that trucking for the greater distances is more costly and should be taken into account here. The Commission correctly described appellants' contention as elusive logic. The principal reason why barge lines can reach out so much further for corn is because they maintain lower charges, but when the river interests extend their operations beyond the sphere of railroad solicitation activity, they are not competing with the rail rates. For

example, Granville on the Belt is 4 miles from a river port, so that the railroad elevator there can only hope to compete for corn grown for 9 miles (4 miles west and 5 miles east). For the additional 31 miles beyond the railroad area of competition the barge line has the field to itself. It meets no competition from the Kankakee branch and whatever trucking expense is incurred from such remote points has not the slightest bearing on competition from the Belt or the relief sought by the railroads in this proceeding anymore than if they were 100 or 1000 miles distant. Similarly, neither the size of river barges nor "the small operations of railroad elevators" (p. 14) is relevant or determinative of any issue presented here.

At p. 9 of the Mechling brief, it is said:

> "Witness Geekie, located at Paris, Illinois, testified that after the 5½ cent rate became effective he bought less corn from the west in the territory served by the NYC's lines to St. Louis and to Cairo (R. 518)"

The witness named made no such statement. He said he is served by the St. Louis and Cairo divisions of the NYC (which intersect at Paris.) His testimony was:

> Q. * * I understand you bought less corn from the west of you after this rate went into effect.
>
> A. "Probably less of the connecting lines to the New York Central west of us." (R. 518)

Conclusion

These appellees have a very vital interest in the outcome of this case. Without the competitive rail rates now available to them, they would again be forced to close their elevators and be deprived of the benefit of their investments and the livelihood which they afford. With the competitive rates they are in a position to carry on businesses that were established many years ago, performing the usual country elevator functions and services and buying corn for rail movement within the narrow compass which the lower barge rates permit. These rail elevator operators see trucks hauling corn past their elevators to reach the river some twenty or more miles further distant because transportation charges for barge movement are so much cheaper than the competitive rail rates.

Mechling pleads that it is a small barge line. (p. 30) These appellees are small country elevators who are threatened with the destruction of their livelihood, and they ask the protection of the law against the large Chicago grain corporations which are striving desperately to rid themselves of any and all competition by having rail rates increased. The increasing of corn bids to the farmers when rail buyers could ship at reasonable competitive rates has been particularly obnoxious and a source of irritation to the Chicago interests and the river shippers aligned with them, but there is no good reason why the Chicago interests —when bidding contemplates a transportation deduction from the Chicago base price—should charge the farmer a high "paper rate" when the transportation charge he actually pays amounts to only 2.7 cents per bushel.

The National Transportation Policy requires the Commission to preserve and maintain in full vigor all forms of transportation—not merely that by barge. Elevators on the Belt are gravely concerned with the threat of abandonment of its west end line because of the loss of its corn and other traffic to competitors. To hold that an old established railroad may not compete with barge carriers for the relatively small amount of corn grown along its rails, under the facts and circumstances here shown, would seem to be in plain violation of the National Transportation Policy.

Respectfully submitted,

LEO P. DAY
6202 South Campbell Avenue,
Chicago 29, Illinois
Attorney for the above-named Defendants-Appellees.

Dated January 24, 1964.

PROOF OF SERVICE.

I, Leo P. Day, Attorney for Defendants-Appellees, McNabb Grain Company, et al., and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 24th, day of January, 1964, I served copies of the foregoing Brief for Defendants-Appellees, McNabb Grain Company, et al., on the several parties by mailing copies thereof in duly addressed envelopes, with postage prepaid, as follows:

1. On the Appellant, Board of Trade of the City of Chicago, copies to its attorneys Harold E. Spencer, Esq., and Richard M. Freeman, Esq., One North LaSalle Street, Chicago 2, Illinois.

2. On the Plaintiffs-Appellants, A. L. Mechling Barge Lines, Inc., Ira Bookwalter, Cullom Cooperative Grain Company, Charles Treasure, Griswold Grain Company, and Mazon Farmers Elevator, copies to their attorneys Edward B. Hayes, Esq., and Wilbeur S. Legg, Esq., 135 South LaSalle Street, Chicago 3, Illinois.

3. On the Appellee, United States of America, copies to the Honorable Archibald Cox, Solicitor General of the United States, Department of Justice, Washington 25, D.C., and to James P. O'Brien, Esq., United States Attorney for the Northern District of Illinois, Room 450 United States Court House, Chicago, Illinois.

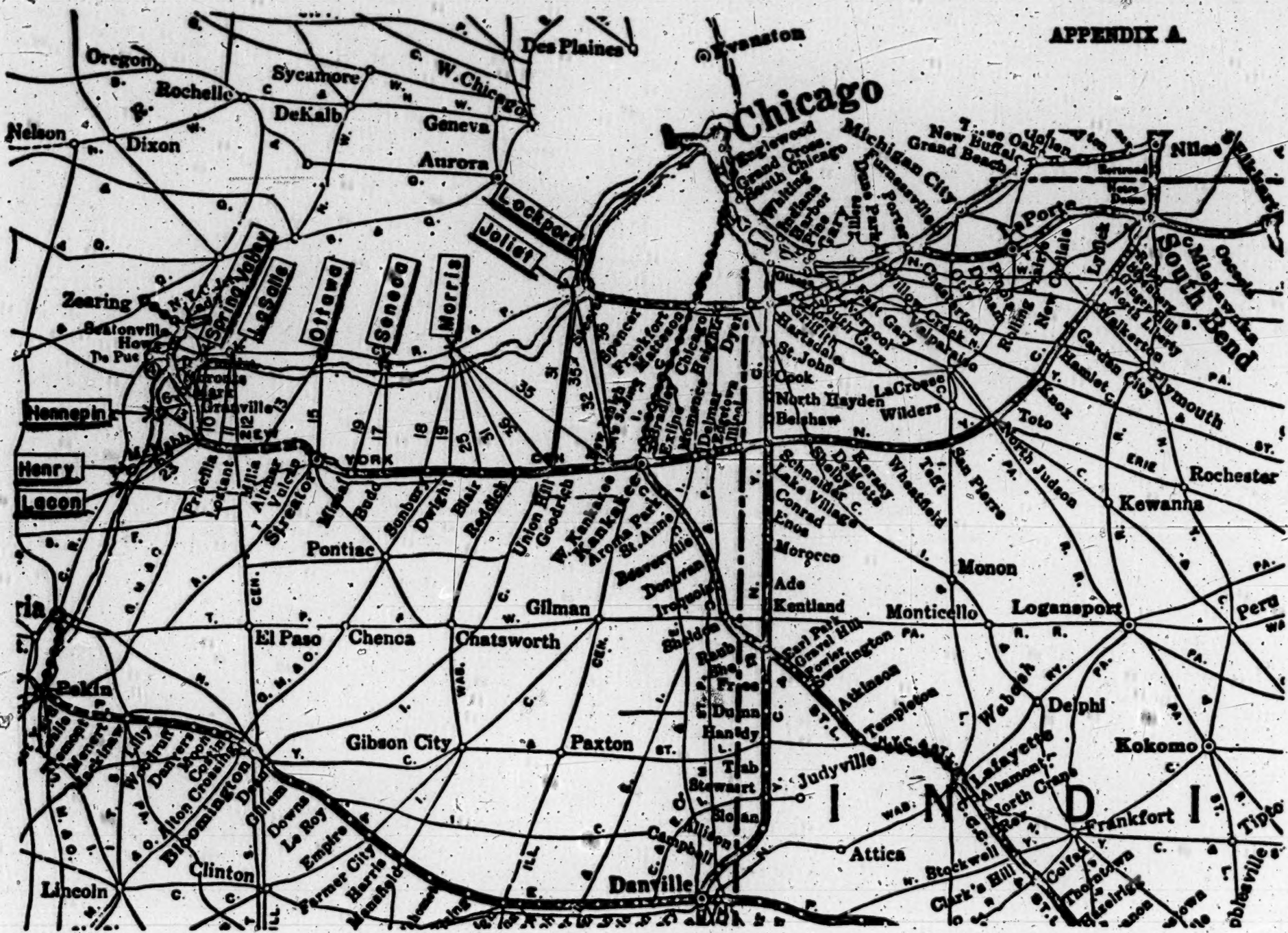
4. On Appellee Interstate Commerce Commission, copies to Robert W. Ginnane, Esq., its General Counsel and H. Neil Garson, Esq., its Associate General Counsel, Washington 25, D. C.

5. On the Appellee, the New York Central Railroad Company, copies to Richard J. Murphy, Esq., its attorney, Room 1225 LaSalle Street Station, Chicago, Illinois.

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Leo P. Day

APPENDIX A.


Chicago
Des Plaines
Evanston
Oregon
Rochelle
Sycamore
W. Chicago
DeKalb
Geneva
Aurora
Nelson
Dixon
Lockport
Joliet
Zearing
Stationville
Spring Valley
LaSalle
Ottawa
Seneca
Morris
Hennepin
Henry
Lecon
Pontiac
Gilman
El Paso
Chenoa
Chatsworth
Peking
Gibson City
Paxton
Bloomington
Clinton
Lincoln
Danville
Attica
Judyville
Monticello
Monon
Logansport
Delphi
Kokomo
Frankfort
Tipton
Rochester
Kewanna
Plymouth
South Bend
Michigan City
La Porte
Gary
Hammond
Whiting
Griffith
Hobart
Valparaiso
Crown Point
Lowell
Rensselaer
Kankakee
Watseka
Momence
Iroquois
Danforth
Milford
Onarga
Gilman
Sheldon
Ridge Farm
Georgetown
Westville
Oakwood
Fairmount
Veedersburg
Attica
Covington
Lafayette
Wabash
Peru
Kentland
Morocco
Conrad
Lake Village
Schneider
Shelby
DeMotte
Kersey
Wheatfield
Toto
Knox
North Judson
San Pierre
Hamlet
Garden City
North Liberty
Walkerton
Bremen
Culver
Argos
Plymouth
Rochester
Kewanna
Monon
Monticello
Loganesport
Peru
Delphi
Kokomo
Frankfort
Tipton
Lafayette
Attica
Danville
Judyville
Clinton
Lincoln
Bloomington
Gibson City
Paxton
Peking
El Paso
Chenoa
Chatsworth
Pontiac
Gilman
Watseka
Kankakee
Momence
Iroquois
Danforth
Milford
Onarga
Oregon
Rochelle
Sycamore
DeKalb
Geneva
Aurora
Nelson
Dixon
Lockport
Joliet
Zearing
Stationville
Spring Valley
LaSalle
Ottawa
Seneca
Morris
Hennepin
Henry
Lecon
Des Plaines
Evanston
Chicago
Englewood
Grand Cross
South Chicago
Whiting
Indiana Harbor
Gary
Dune Park
Furnessville
Porter
Michigan City
New Buffalo
Grand Beach
Niles
Berrien Springs
Dowagiac
Cassopolis
Edwardsburg
Osceola
South Bend
Mishawaka
Elkhart
Goshen
Nappanee
Wakarusa
Bristol
Middlebury
New Paris
Rolling Prairie
Wanatah
Kouts
Valparaiso
Crown Point
Lowell
Griffith
Hobart
Hammond
Gary
Portage
Chesterton

APPENDIX B.

National Transportation Policy, preceding 49 U.S.C. § 1.

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

Section 3(1) of Interstate Commerce Act [49 U.S.C. §3(1)]

"It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or

unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

Section 4(1) of Interstate Commerce Act [49 U.S.C. §4(1)]

"It shall be unlawful for any common carrier subject to this part or part III to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this part or part III, but this shall not be construed as authorizing any common carrier within the terms of this part or part III to charge or receive as great compensation for a shorter as for a longer distance: *Provided,* That upon application to the Commission and after investigation, such carrier, in special cases, may be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property, and the Commission may from time to time prescribe the extent to which such designated carriers may be relieved from the operation of the foregoing provisions of this section, but in exercising the authority conferred upon it in this proviso, the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and no such authorization shall be granted on account of merely potential water competition not actually in existence: *Provided further,* That any such carrier or carriers operating over a circuitous line or route may, subject only to the standards of lawfulness set forth in other provisions of this part or part III and without further authorization, meet the charges of such carrier or carriers of the same type

operating over a more direct line or route, to or from the competitive points, provided that rates so established over circuitous routes shall not be evidence on the issue of the compensatory character of rates involved in other proceedings: *And provided further*, That tariffs proposing rates subject to the provisions of this paragraph requiring Commission authorization may be filed when application is made to the Commission under the provisions hereof, and in the event such application is approved, the Commission shall permit such tariffs to become effective upon one day's notice."

Section 15a(3) of Interstate Commerce Act [49 U.S.C. §15a(3)]

"In a proceeding involving competition between carriers of different modes of transportation subject to this Act, the Commission in determining whether a rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement of the traffic by the carriers to which the rate is applicable. Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy declared in this Act."

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 58

A. L. MECHLING BARGE LINES, INC., A CORPORATION, IRA BOOKWALTER, CULLOM COOPERATIVE GRAIN COMPANY, CHARLES TREASURE, GRISWOLD GRAIN COMPANY, AND MAZON FARMERS ELEVATOR, APPELLANTS

v.

UNITED STATES OF AMERICA, AND INTERSTATE COMMERCE COMMISSION

No. 59

BOARD OF TRADE OF THE CITY OF CHICAGO, APPELLANT

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE NEW YORK CENTRAL RAILROAD COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

The opinion of the district court (R. 74) is reported at 209 F. Supp. 744 and its final judgment is set forth at R. 81. The report of the Interstate Commerce Commission (R. 9–29) is reported at 310 I.C.C. 437. The proposed report of the Commission's hearing examiner is set forth at R. 32–52.

JURISDICTION

The judgment of the district court was entered on September 18, 1962 (R. 81). Separate notices of appeal were filed by A. L. Mechling Barge Lines, Inc., et al. and the Board of Trade of the City of Chicago on November 16, 1962 (R. 82–87). Probable jurisdiction was noted on June 17, 1963 (R. 837). The jurisdiction of this Court rests on 28 U.S.C. 1253 and 2101(b).

QUESTIONS PRESENTED

The provisions of section 4 of the Interstate Commerce Act enable the Commission to authorize rail and water carriers in special cases limited to direct lines or routes to charge shippers less for like transportation services of like kind of property performed over longer distances than for shorter distances, provided the applicable charges on the longer distances are shown to be reasonably compensatory. Carriers need no authority to establish such charges over circuitous lines and routes. The following questions are presented by this appeal.

1. Whether the Commission in authorizing relief from the long-and-short-haul provision of section 4 is required to pass upon allegations of rate unlawfulness arising at a point not on the direct routes, but on a

circuitous route which is not embraced in the order of the Commission?

2. Whether the Commission in a fourth section proceeding which is limited to determining whether a carrier should be authorized to establish reduced through charges to the more distant points and to maintain higher through charges to intermediate points, is required to determine finally whether a proportional rate factor which has no independent application, but is used only as a basis for figuring the through charge, violates other sections of the Act?

3. Whether the Commission in this case abused its discretion when it did not convert a proceeding limited to the specific issues of the fourth section into a general rate investigation?

4. Whether the Commission's findings that the proposed rates are not lower than necessary to meet the barge-rail competition and that the proposed rates do not constitute a destructive competitive practice were properly made upon the basis of the through rates to the more distant points, and whether such findings are supported by substantial evidence of record?

STATUTES INVOLVED

The provisions of the National Transportation Policy, 49 U.S.C. preceding section 1, sections 3(1), 3(4), 4(1), 13(1), and 15(7) of the Interstate Commerce Act; 49 U.S.C. sections 3(1), 3(4), 4(1), 13(1), and 15(7) are set forth in the Appendix, *infra*, pp. 51–55.

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STATEMENT

1. The New York Central Railroad Company operates a rail line running east and west between Moronts and Kankakee, Illinois, called the Kankakee Belt Line. The Kankakee Belt Line is about 80 miles long, and for a distance roughly parallels the Illinois River. The Illinois River near Morris, Illinois, swings in a northeasterly course toward Chicago and Lake Michigan. A. L. Mechling Barge Lines, Inc., is a water carrier operating on the Illinois River and it transports a substantial amount of corn from the territory adjacent to the river to Chicago. Some of this corn is reshipped to eastern destinations. Corn constitutes the major traffic available to the Belt Line from the surrounding area (R. 13–14). The transportation rate is one of the important factors which determines whether the corn is moved to the river for shipment by water carrier such as appellant Mechling, or to a country elevator for shipment by rail.

As a direct result of the development of commerce on the Illinois River beginning about 20 to 25 years ago, there was a drastic diversion of grain and corn traffic orginating in the territory adjacent to the Belt Line, from the all-rail route to the barge-rail route via Chicago, Illinois. Thus, the Commission found that "In 1935, 1940 and 1957, respectively, about 1.5, 19 and 59 million bushels of corn, moved by barge from all Illinois River ports to Chicago" (R. 13). Most of the corn moved by barge originated at ten river ports on the Illinois River which compete with the Belt Line stations. In comparison to the enormous increase in the barge movement of grain and

corn, only a nominal amount moved over the Belt Line. "During 1954, 1955, and 1956, respectively, 467, 729, and 615 carloads of grain including 305, 533, and 464 carloads of corn originated thereat.[1] Most of it was Commodity Credit Corporation corn [government controlled] which is usually shipped by rail for export, and is not subject to the same competitive forces as 'free' corn" (R. 13–14).[2]

The determinative factor in the selection of the mode of transportation prior to December 15, 1956, was the much lower local barge rate of approximately 4.625 cents[3] applicable from competing river ports to Chicago (R. 12) compared with the flat rate of 23 cents from stations on the Belt Line to Chicago. Although the reshipping rate on corn products from Chicago and Kankakee is the same, *i.e.*, 49.5 cents,

[1] Corn averages about 50 pounds to the bushel. A carload of corn based upon 100,000 pounds equals 2,000 bushels. The average number of bushels of corn moved during the years 1954, 1955, 1956 amounts to 868,000 bushels.

[2] As a direct result of the great disparity between the water and rail rates, country elevator operators located near or on the Belt Line watched the corn go past their doors down to the river. The status of the country elevator operators changed to buyers or merchandisers of corn for barge movement (R. 15, 16, 27). The lack of competitive rail rates tended to give the water carriers a monopoly on the movement of the considered traffic. This seriously affected the farmers since they were deprived of the benefits resulting from competitive bids. After the new rate became effective farmers received much more than they had received previously. For example, a farmer at the country elevator located at Blair, Illinois, received at least 8.75 cents a bushel more for his corn than he was able to obtain prior to the effective date of the challenged rate (R. 16, 19). (See also R. 463, 483, 490, 502–503, 504, 527, 676–677, 698).

[3] After the NYC had reduced its rates, the barge rate was increased in December, 1957, to 4.825 cents (R. 12).

the barge-rail combination produced a rate of 54.125 cents compared to the much higher combination all-rail rate of 72.5 cents. Hardly any corn traffic could be attracted to the Belt Line under such rate conditions, and the all-rail rate simply became a "paper" rate.

In an effort to meet the barge-rail competition,[4] effective December 15, 1956, the New York Central established a competitive proportional rate of 5 cents (now 6 cents because of general rate increases) minimum 100,000 pounds applicable on corn and corn products when milled in transit from Belt Line stations west of Kankakee to Kankakee for final destination at points east of the western termini of eastern trunk line carriers.[5] The proportional rate had no independent application but could only be used in conjunction with the existing reshipping rates beyond Kankakee as a factor in determining the ultimate through rates on corn products. The lawfulness of the new proportional factor was not challenged, and it became effective as scheduled.

Initially it was believed that any departures from the long-and-short haul provisions of section 4(1)

[4] The Commission points out (R. 11), "The proposed reduced rates are designed to recapture traffic represented as having been lost to competing barge lines operating by way of Chicago in conjunction with rail lines beyond. The carriers do not desire to reduce existing rates at higher-rated intermediate points not affected by the same competitive conditions."

[5] This would include points in New York, Pennsylvania, West Virginia, the New England States, Delaware, the District of Columbia, Maryland, New Jersey and Virginia.

of the Interstate Commerce Act, 49 U.S.C. §4(1), resulting from the application of the new proportional rate would be covered by existing Fourth Section Orders of the Commission. However, it was subsequently discovered that this was not the case and that additional authority was necessary. On June 27, 1957, the New York Central filed an application for fourth section relief with the Commission. The relief requested would permit the continuance or establishment and maintenance over existing all-rail routes, of reduced rail rates consisting of a combination of proportional rates from origins on the Belt Line west of Kankakee to points in the territory noted in footnote 4, *supra,* and to charge higher rates at intermediate points which are not subject to the same competitive forces. The application also was intended to cover a subsequent rate revision, effective August 29, 1957, designed to eliminate unauthorized destination departures (R. 12).

The relief authorized by the Commission is applicable only to the movements over direct routes by way of Kankakee from stations on the Belt Line west of Kankakee to destinations in the east. (See Fourth Section Order No. 19346, R. 29–30.) Chicago and points within the Chicago switching district are not on the direct routes covered by the Commission's fourth section order, and as such, are not embraced in the relief granted by the order. The proposed rates may be established over the circuitous routes via

Chicago without any prior approval or authority of the Commission.[6]

2. In accordance with the Commission's established initial rate procedure, the appellants filed protests against the fourth section application urging that the relief be denied (R. 172, 234, 251, 282). In addition, the appellants challenged the lawfulness of the proposed rate revisions effective August 29, 1957 under other sections of the Interstate Commerce Act such as sections 1 and 3 (R. 96, 126, 127, 133). They requested that the Commission invoke its discretionary investigation and suspension authority under secton 15(7) of the Interstate Commerce Act, 49 U.S.C. § 15(7) which enables the Commission to enter into a general investigation into the lawfulness of challenged rates under all other applicable rate provisions of the Act.[7]

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[6] The second proviso of section 4(1) of the Act provides as follows:

> * * * *Provided further*, That any such carrier or carriers operating over a circuitous line or route may, subject only to the standards of lawfulness set forth in other provisions of this part or part III and without further authorization, meet the charges of such carrier or carriers of the same type operating over a more direct line or route, to or from the competitive points, provided that rates so established over circuitous routes shall not be evidence on the issue of the compensatory character of rates involved in other proceedings: * * *

[7] The rates which had become effective on December 15, 1956 were no longer subject to the suspension provisions of section 15(7) of the Interstate Commerce Act. See *Arrow Transp. Co. v. Southern R. Co.*, 372 U.S. 658 (1963).

The New York Central filed a reply to the protests[8] (R. 252).

The limited matter of the fourth section application received initial consideration by a board of employees of the Commission known as the Fourth Section Board. The requests for a general investigation and suspension of the proposed rate revision were given initial consideration by another board of employees called the Board of Suspension.

The Board of Suspension, acting first on August 26, 1957, decided not to institute an investigation and not to suspend the proposed rate revision. The notice of the Board of Suspension specifically states *"This action does not constitute approval of the protested schedules. They may be made subject to investigation through formal complaint filed in accordance with the Commission's Rules of Practice"*[9] (R. 87). Upon the completion of its investigation the Fourth Section Board entered a fourth section order on August 27, 1957, granting the relief sought pending a hearing. The order of the Fourth Section Board also stated (R. 88) *"The Commission does not hereby approve any rates that may be filed under this authority, all such rates being subject to complaint, investigation*

[8] The Commission received two dozen letters and telegrams from grain and elevator companies and local banks on the Belt Line in support of the competitive all-rail rate revision.

[9] Such a complaint may be filed with the Commission at any time—even today—under the authority of section 13(1) of the Interstate Commerce Act, 49 U.S.C. § 13(1).

and correction if in conflict with any provision of the Interstate Commerce Act." [10] [11]

The appellants filed petitions for reconsideration of the action of both Boards. On August 27, 1957, Division 2 of the Commission acting as an Appellate Division upheld the action of the Board of Suspension by voting not to suspend the protested rate revision, and a notice to that effect was issued on the same date (R. 90). The notice reminded the protestants that *"The action of the Board of Suspension and of Division 2 does not constitute approval of the protested schedules."* Additionally the determination not to suspend the proposed rate signified that the Commission had decided not to exercise its discretionary authority to enter upon a general rate investigation under section 15(7) of the Act. This placed the appellants on notice that any further challenge regarding the general lawfulness of the rates would have to be initiated by the appellants by filing a formal complaint under section 13(1) of the Act. Thus, the provisions of section 1.42 of the Commission's General Rules of Practice, 49 C.F.R. 1.42, specifically provides that "no protest shall include a prayer that

[10] This clause usually concludes a fourth section order to place interested persons on notice that the rates established and maintained under the authority may be challenged in an appropriate complaint proceeding before the Commission. See *Intermountain Rate Cases*, 234 U.S. 476, 493.

[11] The validity of the temporary fourth section order is not in issue here. Cf. *A. L. Mechling Barge Lines, Inc.* v. *U.S. and I.C.C.*, 368 U.S. 325 (1962). The fourth section order which is the subject of this appeal is based upon a full hearing and a report containing complete findings in accordance with the requirements of section 4.

it also be considered a formal complaint. Should a protestant desire to proceed further against a tariff * * * which is not suspended * * * a separate later formal complaint * * * should be filed."

The following day, August 28, 1957, the same Division of the Commission sustained the action of the Fourth Section Board. A notice of the Commission dated August 28, 1957, announcing action of Division 2 was issued and it also informed the protestants that "*The action of the Fourth Section Board of Division 2 does not constitute approval of the rates. They may be subject to an investigation through formal complaint in accordance with the Commission's Rules of Practice*" (R. 92).

Instead of filing a formal complaint with the Commission assailing the lawfulness of the reduced rates, the appellants elected to challenge the Commission's action in court. On November 29, 1957, a three-judge statutory district court issued its order dismissing the complaints for lack of jurisdiction.[12]

In the meantime, the Commission set the rail carriers' application for fourth section relief for hearing before an examiner. Hearing was held January 29, 1958, through February 4, 1958, in which appellants fully participated.

On March 11, 1959, the report of the examiner was issued (R. 32). Although the examiner recommended

[12] The case is entitled *A. L. Mechling Barge Lines, Inc., et al.* v. *United States and I.C.C., et al.*, C.A. No. 57 C 1450, U.S.D.C. N.D. Ill., E. Div.

that the application be denied,[13] he recognized the need for a rail rate adjustment to restore competition in this corn producing area, and that the adjustment would require fourth section relief.[14] With respect to Board of Trade's allegations of discrimination, the examiner held that "these issues [allegations] do not directly deal with the fourth-section principles here involved, but are properly matters which may be raised in investigation or complaint proceedings"[15] (R. 49).

After the filing of exceptions and replies to the examiner's recommended report and order upon the request of several of the parties, Division 2 of the Commission heard the parties in oral argument on October 29, 1959. Thereafter, the report and order of June 8, 1960, the subject of this appeal, was issued by Division 2 which granted the application for

[13] The examiner recommended that the application be denied on the theory that the 6-cent proportional rate factor of the through rate, standing alone, was not reasonably compensatory.

[14] The examiner found that "It is clear that the competitive situation which prevailed prior to the proposed rate between the all-rail and the barge-rail rates on corn from the northern Illinois territory to the East required an adjustment in the all-rail, and that such an adjustment requires fourth section relief." Significantly, even the appellants acknowledged that the prevailing all-rail rate had to be reduced before the Belt Line could participate in the traffic (R. 49–50). It should be noted that no fourth section relief would be required if the NYC chose to eliminate fourth section departures on the direct routes.

[15] In his report the examiner did not amplify his reasons given at the hearing for denying further cross-examination of the NYC witness on the subject of division of rail rates at Chicago. At the hearing the examiner's reason for his ruling was that the matter of divisions at Chicago was not "pertinent to the issues in this particular case" (R. 343).

fourth section relief (R. 9). The accompanying Fourth Section Order No. 19346 states in part: "The Commission does not hereby approve any rates filed under this authority, all such rates being subject to complaint, investigation, and correction if in conflict with any provision of the Interstate Commerce Act" (R. 29).

Petitions for reconsideration of the report and order of Division 2 were denied by the Commission on November 18, 1960 [10] (R. 31).

3. In granting the application for fourth section relief, the Commission specifically found "that applicants have shown a special case within the meaning of section 4 of the Act, by virtue of actual and compelling competition; that the proposed rates are not lower than necessary to meet that competition, do not constitute a destructive competitive practice, are reasonably compensatory, and will not impose an undue burden on other traffic" (R. 28–29). The finding, that the proposed rates were reasonably compensatory, was based upon the entire through rate from origins on the Belt Line to ultimate destinations in the east on the ground that the proportional "rate factor has no independent existence, but is an integral part of the rate which applies on the through transportation, from Belt origin, through the milling-in-

[10] In denying the appellants' petition for reconsideration, the Commission held that "the matters submitted in support thereof do not constitute substantial and material grounds to warrant reopening of this proceeding for reconsideration and reargument" (R. 31).

transit point, to delivery of the corn product at its ultimate destination" (R. 25).[17]

Of primary significance in this case is the fact that pending the proceedings before the Commission, it had the opportunity to observe the effect of the proportional rate effective December 15, 1956, upon the traffic of the competing barge line. Despite the restoration of effective competition, there was a substantial increase in the barge traffic to Chicago during the period December 15, 1956, to August 30, 1957, of about 90,000 tons over a corresponding period for the previous year. However, there was also a substantial increase in the amount of rail traffic originated on the Belt Line for a similar period.[18] After analyzing the corn movements in the Belt Line territory, the Commission was able to conclude that the new all-rail through rates attracted corn grown near the rail lines to the rails, whereas, corn grown in proximity to the river continued to be shipped by barge (R. 28).

The district court after careful review of the Commission's report concluded that the assailed order

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[17] In this connection, it must be noted that no fourth section departures occur on the inbound movement to a transit point such as Kankakee or Chicago. It is only when the reshipping rate is added to the inbound proportional rate to determine the through rate that the fourth section departures occur.

[18] For the period December 15, 1955–August 30, 1956, the barge shipments to Chicago amounted to 402,105 tons. They rose to 493,668 tons for the same period the following year. The 6-, 8-, and 12-month periods ending June 30, August 31, and December 31, 1957, show that Belt Line traffic progressively increased from 1,915 carloads of corn to 2,681 carloads (R. 14, 28).

fell within the statutory power of the Commission, that its findings and conclusions were supported by substantial evidence of record, and that no prejudicial error occurred in the hearings before the examiner and the Commission (R. 80).

The allegations of discrimination were discounted by the Commission when it pointed out that the proposed rates apply "from Belt points to eastern destinations via either Kankakee or Chicago," (R. 24) and that "since the proposed rates are effective over Chicago, that point has the same stature as all other corn-processing points in official territory in their application" (R. 27). Moreover, the Commission found that "there is no indication of undue damage to Chicago" (R. 27). The district court held that "there is no indication of undue damage to Chicago" (R. 27). The district court held that the Commission is not required to go beyond the statutory requirements of section 4 to make ultimate findings that "a rate is lawful and not discriminatory" (R. 77). In this respect, the district court held that the allegations of discrimination should have been raised under the complaint provisions of section 13(1) of the Interstate Commerce Act, 49 U.S.C. § 13(1), which is appropriate for that purpose (R. 77).

SUMMARY OF ARGUMENT

I

Section 4 of the Interstate Commerce Act is directed against a specific form of rate discrimination, *i.e.*, discrimination brought about by rail or water

carriers charging short-haul shippers more in the aggregate than the long-haul shippers for the transportation of like kind of property over the same route in the same direction, the shorter being included in the latter. However, section 4 also provides that the Commission may authorize a carrier to charge less for a longer than for a shorter distance limited to direct routes where the Commission finds that a special case exists and that the charges to or from the more distance point proposed to be established by the carrier are reasonably compensatory.

An order granting fourth section relief to the rail carrier applicants was issued by the Commission after a hearing. The order was limited to the direct all-rail routes from origins on the Belt Line to eastern destinations. The order also authorized the rail carriers to establish reduced through charges to the more distant points and to maintain higher through charges to intermediate points.

The fourth section order of the Commission is challenged because of alleged violations of sections 3(1) and 3(4) of the Act occurring at Chicago. Chicago is not on any of the direct all-rail routes embraced in the fourth section order. The rates which apply to the circuitous routes via Chicago are the result of independent action taken by the rail carriers which, since the 1957 amendment to section 4, does not require approval by the Commission. Since the fourth section order did not authorize much less require the establishment of a similar rate adjustment at Chicago, the Commission was not required to pass upon allegations of rate unlawfulness arising at a point not on

the direct routes, but on a circuitous route which is not embraced in the order of the Commission. The provisions of section 13(1) of the Act provide an appropriate and ample remedy for bringing to the Commission's attention collateral issues which are not involved in the fourth section proceeding before it.

II

The provisions of section 4 were designed primarily to prevent carriers from engaging in discriminatory practices which result in the long haul shippers obtaining an unreasonable rate advantage over competing short haul shippers. An order of the Commission authorizing an exception to the rule of section 4 permits the carrier to reduce through rates to the more distant points and to maintain higher through rates to the intermediate points. The attack upon the Commission's fourth section order disregards the through charges which it authorizes to be established and maintained. Instead the attack is concentrated upon a proportional factor to the transit point, a factor which has no independent application and which exists only as a part of the through charges as to which the Commission authorized departures from section 4. It is contended that this proportional factor which is neither the through charge to the more distant point, nor the charge to the intermediate points, a rate relationship to which the fourth section and the Commission's order are addressed, is not reasonably compensatory. In determining whether rates proposed to be established under the authority of a fourth section order are reasonably compensatory, the provisions of

section 4 on its face clearly require the Commission to base its determination on the through charge "to or from the more distant point". The proportional factor is not the through charge accordingly, the Commission is not required to determine in a fourth section proceeding whether the proportional factor, standing alone, violates other sections of the Act.

III

In a proceeding limited to the specific issues of section 4, namely, whether a special case exists, and whether the charge to or from the more distant point is reasonably compensatory the Commission is not required to enlarge the scope of its investigation to include issues under sections 3(1) and 3(4) of the Act which occur on routes other than the direct routes involved in the fourth section application. The limited provisions of section 4 were never intended to be used as a substitute for the broad general standards of section 3(1), which combined with the provisions of section 15(1), enable the Commission to deal with unlawful preferences and prejudices over all routes direct and circuitous which may be involved in a general rate investigation. In contrast the Commission in a section 4 proceeding is limited to a grant or denial or modification of the relief requested over the specific routes seeking fourth section relief. Allegations of rate unlawfulness occurring on routes other than the relief routes are not material to the issues before the Commission and for that reason need not be passed upon by the Commission, even where evidence as to such allegations is admitted into the record.

Whether the Commission should enlarge the scope of a section 4 proceeding beyond the limits of section 4 into a general rate investigation is committed by law to the discretion of the Commission. Where the evidence of undue preference and prejudice relating to the application of a milling in transit limitation consists merely of rate comparisons and nothing more to show a violation of section 3(1), the Commission cannot be said to have abused its discretion when it did not convert the limited section 4 proceeding into a general rate investigation.

IV

The Commission's determination that the proposed rates are not lower than necessary to meet the competition and do not constitute a destructive competitive practice was based upon findings showing that the through charges are reasonably compensatory. These findings were made in accordance with the long standing criteria of a reasonably compensatory rate set forth in *Transcontinental Cases of 1922*, 74 I.C.C. 48. As to these findings the district court found that there was substantial supporting evidence of record. No one challenged the compensativeness of the through rates. The provisions of the National Transportation Policy relating to destructive competitive practices do not impose any more or different standards for determining whether a rate constitutes a destructive competitive practice than the long established test followed by the Commission for almost half a century *which are spelled out in Transcontinental Cases of 1922, supra.* Finally where a competing barge line

can meet the reduced all-rail rate applicable to direct routes and still recover its fully distributive costs no destructive competitive practice is shown.

ARGUMENT

I

In determining whether a carrier should be permitted to charge a long-haul shipper less than a short-haul shipper for like transportation service over direct routes, the Commission is not required to consider and pass upon alleged violations of other rate sections of the Interstate Commerce Act which do not occur on the direct routes embraced in the fourth section application

The provisions of section 4(i) of the Interstate Commerce Act are directed against a specific form of rate discrimination by common carriers by rail and water. Thus, section 4 of the Act forbids such carriers from charging or receiving any greater compensation in the aggregate for the transportation of like kind of property for a shorter distance than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance. This is not an absolute and inflexible prohibition which is intended to prevent carriers in appropriate competitive situations from establishing rates which result in higher charges to the shorter haul shippers in contravention of the prohibition set forth in section 4.[19] Congress has qualified the prohibition of section 4 by providing, "that upon application

[19] See Report of the Senate Select Committee on Interstate Commerce (Cullum Report), 49 Cong. 1st Sess. 1886, Vol. 1, pp. 195–198; and *In Re Louisville & Nashville R.R. Co.*, 1 I.C.C. 31, 78 (1887).

to the Commission after investigation, such carrier, in special cases may be authorized to charge less for longer than for shorter distances for the transportation of property * * * but in exercising the authority conferred upon it in this provision the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory."

A. Where the Commission authorized relief from the long-haul short-haul provisions over direct routes, it was not required to determine whether the carrier publication of the same rates applicable to circuitous routes violated section 3 (1) and (4)

Prior to July 11, 1957 carriers desiring to charge shippers higher rates at the intermediate points than at the terminal points over any routes, direct or circuitous were required to obtain long and short haul relief from the Commission. On July 11, 1957, the provisions of section 4(1) were amended. The amendment limited the application of section 4, and the Commission's power thereunder over fourth section departures only to the direct routes. At the same time, the amendment authorized carriers operating over circuitous routes to meet the charges made over the direct routes without requiring any approval by the Commission.[20] With the enactment of the 1957 amendment, the Commission confined its consideration of fourth section applications to relief over the direct routes. *Iron & Steel to Southwest Gulf Ports,* 301 I.C.C. 669, 670 (1057); *Sulphuric Acid From Nitro, W. Va. to Jeffersonville, Ind.,* 302 I.C.C. 143, 147 (1957).

[20] The provisions of the 1957 amendment to section 4 are set forth in ftn. 5, *supra.*

Although the application of section 4 was limited solely to the direct routes by the 1957 amendment, shippers at the intermediate points on the circuitous routes were not left without a remedy. It was contemplated that aggrieved shippers at the intermediate points on circuitous routes could file a complaint with the Commission pursuant to section 13(1) of the Act against the rate action taken by the carriers.[21]

Thus, shippers are able to challenge the lawfulness of reduced rates over competitive circuitous routes to the same extent and in the same manner that they are able to dispute the lawfulness of any other carrier-made rates. That this is the intent of Congress is borne out by the legislative history of the 1957 amendment. Report of the House Committee on Interstate and Foreign Commerce, H.R. Rep. No. 577, 85th Cong. 1st Sess., pp. 2–3 (1957).

In the instant case, neither Chicago nor the Chicago Switching District are on any of the direct routes involved in the fourth section proceeding before the Commission. This is graphically illustrated by exhibit 2 to the NYC application for fourth section relief (R. 140) which consists of a map depicting in red the direct all-rail routes from stations on the Belt Line to the east as going via Kankakee. The Commission at the outset of its report (R. 10) indicates that it is limiting its considerations to relief over the direct all-rail routes for transportation of

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[21] The amendment simply reinstated fourth section regulation as it existed prior to the Mann-Elkins Act of 1910. *Interstate Commerce Commission* v. *Alabama Midland Ry.*, 168 U.S. 144.

corn products from origins on the Belt Line to eastern destinations. Indeed, the proof offered by the applicant railroads at the hearing in support of their application was directed only to the need for relief over the direct routes. Additionally, Fourth Section Order No. 19346 (R. 29–30) in which the Commission granted the fourth section relief challenged by the appellants, specifically covers only the direct all-rail routes.

While the proposed reduced rates were made applicable via Chicago giving the Chicago shipper of corn products the same benefits accruing to the Kankakee shipper of corn products, it is abundantly clear that the reduced rate over the circuitous route through Chicago was established by the voluntary act of the rail carriers which required no fourth section relief or approval by the Commission. Thus, any alleged grievances which the appellants may have at Chicago do not result from the fourth section order of the Commission challenged here for the order does not cover the routes through Chicago.

In view of the fact that the grant of fourth section relief applicable to direct routes via Kankakee did not even authorize, much less require the establishment of a similar adjustment at Chicago, there is no basis for an allegation that the fourth section order created a section 3(4) or any other violations of the Act at Chicago. Since the rate to movements via Chicago does not result from the action of the Commission granting the fourth section relief over Kankakee, but from the voluntary act of the carriers publishing the same rate to apply via Chicago, the

remedy of the appellants is not in the Fourth Section proceeding, but by the initiation of a complaint under section 13 of the Act alleging violations of appropriate sections of the Interstate Commerce Act. *United States* v. *Merchants & M. Traffic Ass'ns.*, 242 U.S. 177.

It is clear from what has been said above that as between Chicago and Kankakee, no unlawful preference and prejudice relationship has been created by the action of the Commision granting fourth section relief over the all-rail direct routes via Kankakee. Moreover, any benefits enjoyed by the shippers of corn products through Kankakee accrue also to the shippers of corn products through Chicago.

In fact the shippers at Chicago are enjoying greater benefits as a result of the reduced rate than the shipper of corn off the Belt Line through Kankakee. Unlike the Kankakee shippers, the Chicago shippers also have available to them the much lower barge-rail rate applicable to Chicago which is not subject to the milling-in-transit limitation. The disability of a grain dealer of whole corn at Chicago who is allegedly unable to quote a definite price because he does not know where or whether the corn will be processed prior to final delivery is an infirmity of his business practices which cannot be attributed to the right of a carrier to initiate rates for the transportation service it provides. The Commission was correct in finding (R. 27):

> * * * However, since the proposed rates are effective over Chicago, that point has the same stature as all other corn-processing points in official territory in their application. Moreover, the routes over Kankakee are the same as they

were for many years prior to the establishment of the proposed rates, and, while limited in their scope as compared to making the inbound rate break on Chicago, there is no indication of undue damage to Chicago.

B. In a section 4 proceeding which is limited to determining whether a carrier should be authorized to establish reduced through charges to the more distant point, and to maintain higher through charges to intermediate points the Commission is not required to determine whether a proportional rate factor, which has no independent application, but is used only in determining the through charge, violates other sections of the Act

The appellants take the view that the Commission's action in this case granting fourth section relief which enabled the rail carriers to establish reduced rates over the direct routes via Kankakee to the more distant points and to maintain higher rates to the intermediate points constitutes an unsound departure from the Commission's policy of denying fourth section relief where the rates established under the Commission's order violate other sections of the Act, especially section 3(1). Furthermore, they assert that the Commission erred when it did not finally rule upon the evidence submitted into the record to support their allegations of unlawfulness under sections of the Act other than section 4. This bare allegation is made without any consideration of the issues which confront the Commission in a section 4 proceeding. It simply overlooks the specific limitations of the statute such as discussed in subpoint A above, and the type of order entered by the Commission. Of course, the Commission does not grant relief from the prohibition of the fourth section where the rates proposed to be established and maintained under such an order, results in violations of other sections of the Act. But,

certainly this does not mean that every allegation of rate unlawfulness, no matter how remote, is to be disposed of in a fourth section proceeding.

The fourth section order of the Commission authorizes a variance in rates between the long-haul shipper and the short-haul shipper, *i.e.*, it authorizes reduced *through* rates on the long-haul movement compared to the higher *through* rates to intermediate points. Shippers adversely affected by such *through* rates may intervene and be heard in the fourth section proceeding.

But, in this case, the attack is directed not against the rates to the more distant or to the intermediate points authorized to be maintained by the fourth section order; instead, the attack is directed at a proportional factor to the transit point—with no independent application—which proportional factor exists only as a part of the through charges as to which the Commission authorized departures from section 4. The proportional factor is not the *through* charge to the more distant point, nor is it the charge to the intermediate points, a rate relationship to which the fourth section order is primarily directed. Accordingly, the Commission was not required to pass upon allegations of unlawfulness which did not result from the *through* charges authorized and applicable at either the more distant or the intermediate points. For this reason the Commission was not required to extend its considerations beyond the issues immediately before it which were raised by the fourth section application.

However, Mechling and the Board of Trade did not attack the *through* charges before the Commission.

Instead, they concentrated upon the proportional rate factor which has no independent application. Practically all of the evidence submitted by the protestants before the Commission was directed against the level at which the rail applicants chose to peg their competitively compelled all-rail rates. (*E.g.*, statement of position by Board of Trade's witness Chartrand, R. 795.) In order to show that the reduced rate was not reasonaby compensatory appellants Board of Trade and Mechling concentrated their attack upon the 6-cent proportional rate factor on the theory that the 6-cent proportional rate factor was a separate component of a through rate. The Board of Trade and Mechling did not challenge the compensativeness of the through charges.

The Commission rejected the theory of the Board of Trade and Mechling holding (R. 25) "that [the] rate factor has no independent existence, but is an integral part of the rate which applies on the through transportation from Belt origins, through the milling in transit point, to delivery of the corn products at its ultimate destination." The 6-cent proportional rate factor has no independent application to shipments from stations on the Belt Line to the transit points. No fourth section departures occur at points between the Belt Line origins and the transit points; such as Kankakee. It is only after reshipment from such a transit point where the proportional rate factor is used to determine the through charge that fourth section departures occur.

The provisions of section 4 are intended to prevent carriers from engaging in discriminatory practices in

which the long-haul shipper obtains a rate advantage over competing short-haul shippers. *Texas & Pacific Ry. Co.* v. *United States*, 289 U.S. 627, 638. Section 4 speaks in terms of "compensation in the aggregate" and "the establishment of any charge to or from the more distant point." The 6-cent proportional rate is neither the compensation in the aggregate for the longer distance, nor is it the charge to or from the more distant point. The Court below held that the Commission's treatment of the reasonably compensatory issue was correct (R. 78). Although appellants in No. 58 renew their attack upon the 6-cent proportional, the United States concedes with the qualifications which we discuss hereafter, that the Commission's position is correct stating (Br. of U.S., p. 32):

> * * * In other words, we agree that the legislative history of the statute,* as well as its plain terms, support a construction which prohibits the granting of Section 4 relief only if the total rate for a *longer* haul is not compensatory. Since the figures which are to be compared in this case are the rate for the short haul from Kankakee to the eastern destination and the rate for the long haul from the Belt origin to that destination, the Commission properly rejected the protestants' contention that Section 4 relief was prohibited because the proportional rate from the Belt origin to Kankakee (only part of the long haul) was non-compensatory. (*Footnote omitted.)

We submit that the interpretation of the reasonably compensatory provision sought by Mechling at this

time is illogical and does not comport with the plain terms of section 4.

C. Upon the record made in this case there is no showing that the Commission abused its discretion when it did not convert the proceeding before it which was limited to the specific issues of section 4 into a general rate investigation

Shippers who are not on the routes embraced in a fourth section order, or who cannot show that they are adversely affected by the through rates applicable for the long and short haul shippers authorized by the fourth section order, do not require the protection of section 4, for their interests are safeguarded by other appropriate sections of the Act such as section 1 dealing with the reasonableness of rates; the discrimination provisions of section 2; and the provisions of section 3(1) relating to undue and unreasonable prejudice and disadvantage between shippers, all of which can be raised by complaint under section 13(1). Significantly, the provisions of section 3(1) do not apply to the traffic of another carrier; thus, "this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description." This is so because a carrier's interest is directed at the level of the rates published by its competitor, and whether the published rates are lower than necessary to meet existing fair competition. *Seatrain Lines, Inc.* v. *United States,* 168 F. Supp. 819 (S.D.N.Y., 1958); cf. *Interstate Commerce Commission* v. *New York, N.H. & H.R. Co.,* 372 U.S. 744, 759 (1963). We submit that the limited and specific provisions of section 4 designed primarily for the

protection of intermediate shippers on the relief routes, were never intended to be used as a substitute for the broad and general standards of section 3(1).

Section 4 of the Act is simply a specification of a more general standard. This was initially recognized by the Commission in the *Railroad Commission of Nevada* v. *Southern R. Co.*, 21 I.C.C. 329 (1911), when it stated (p. 338):

> * * * The test which the Commission must now apply to determine whether the carrier may be given the advantage of an exception to the general rule of section four is the same test that it may apply with respect to any other discrimination or inequality. There is incorporated in section four every standard set up by Congress as a *guide* to this Commission which is to be found in any section of the act. (Emphasis supplied.)

This does not mean that section 4 contains the same comprehensive provisions as section 3 which enables the Commission to deal with unlawful preference and prejudice between shippers on a broad scale. *New York* v. *United States*, 331 U.S. 284; *Ayrshire Collieries Corp* v. *United States*, 335 U.S. 573; *New York Central Railroad Co.* v. *United States*, 207 F. Supp. 483 (S.D.N.Y., 1962). Section 4 is no more a substitute for the broad provisions of section 3(1) than are the limited exacting discrimination provisions of section 2 for section 3(1). *Texas & Pacific Ry. Co.* v. *Interstate Commerce Commission*, 162 U.S. 197, 219; *Barringer & Co.* v. *United States*, 319 U.S. 1, 13. Significantly, under section 3(1) and 15(1) the Commission is empowered to prescribe the precise

rate or the maximum and/or minimum necessary to remove the undue prejudice. Such an order runs against all of the carriers that effectively participate in both the prejudiced and the preferred rates over all of the routes involved in the proceeding. In contrast, in a section 4 proceeding the Commission's power is limited to a grant or denial or modification of the relief prayed over the specific routes seeking fourth section relief.

In determining the limited issues presented by a section 4 application dealing with the rate relationship between the long and short haul shipper over direct routes, the standards of section 3(1) are to be employed as a *guide* in resolving whether an exception to the long and short haul prohibition should be sanctioned. Section 3(1) was not intended to replace section 4, but this conclusion follows if the appellants' views are adopted. Under appellants' views, every fourth section application proceeding could be converted into a general rate investigation,[22] but this is

[22] The United States apparently believes this should occur only if found to be practicable by the Commission (U.S. Br., pp. 23, 25–26). There was no reason for the Commission to determine whether it would be practicable to enlarge the scope of the section 4 proceeding to include issues not bearing on the questions of whether a special case existed and whether the rates proposed are reasonably compensatory because, after considering the protests which assailed the general lawfulness of the rates, the Commission declined on its own motion to institute such an investigation, and the matter was set down for hearing limited to the issues of section 4 (R. 11). There was no occasion to consolidate the general rate issues raised by the appellants Board of Trade and Mechling because they never did file a formal complaint under section 13 with the Commission.

precisely what the Commission did not intend to do in August, 1957 when it declined on its own motion to exercise its discretion under section 15(7) to institute an investigation and suspension proceeding. Cf. *Arrow Transp. Co.* v. *Southern R. Co.*, 372 U.S. 658. Clearly the Commission's refusal to institute a general rate investigation on its own motion is discretionary and may not be compelled. *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309.

However, the appellants contend that since evidence relating to section 3(1) violations brought about by the milling in transit limitation had been placed in the record, the Commission was required to rule on such evidence before disposing of the section 4 application. This argument assumes (1) that the evidence adduced by the Board of Trade is relevant and material to the section 4 issues before the Commission, and (2) that the evidence was sufficient to warrant final disposition by the Commission.

The provisions of section 8(b) of the Administrative Procedure Act, 5 U.S.C. 1007(b), only require the Commission to make findings upon *material* issues of fact, law or discretion presented on the record. *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 167–168 (1962). Section 4 specifies the test which the Commission must apply before it can authorize a carrier to charge less for a long haul than for a short haul over direct routes. The Commission must determine (1) whether a special case exists and (2) whether the charge to or from the more distant point is reasonably compensatory. Evidence relating only to these

limited questions is material to the sole issue posed by section 4, *i.e.*, whether the applicant should be excepted from the long and short haul prohibition. *Seatrain Lines* v. *United States*, 168 F. Supp. 819, 824–826; *United States* v. *Merchants & Manufacturers' Assn.*, 242 U.S. 178; cf. *Koppers Company* v. *United States*, 132 F. Supp. 159 (D.C. Pa., 1955). No other conditions are prescribed by section 4(1) which the Commission must consider before authorizing relief from the long and short haul provision.[23] The order of the Commission is permissive only; "it does not name or prescribe the rates and it appears that the intent of its effect is that a proper showing has been made for the allowance of an exception to the long and short haul clause and to permit the exception to operate." *City of Danville* v. *Chesapeake & O.R. Co.*, 34 F. Supp. 620, 632–633. In fact the order of the Commission specifically disclaims any approval of the rates filed under the authority (R. 30); and the proceeding before the Commission is confined solely to the issue of section 4. Evidence relating to unjust discrimination offered by shippers which are not on the direct routes embraced in the fourth section application and by competing carriers is not material to the issue before the Commission. Therefore, the Commission is not required to pass upon such evidence, especially where the provisions of section 13(1) of the Interstate Com-

[23] Section 4 also requires that the water competition actually exist before relief is granted. There is no doubt of the existence of severe water carrier competition in this case.

merce Act afford a complete right to redress." *United States* v. *Merchants & M. Traffic Assn., supra.*"

The United States and the Board of Trade assert that there has been full development of the evidence relating to the allegation that the milling in transit limitation violated section 3(1). To support this assertion, they point to the testimony of Witness Chartrand (R. 794–827). Except for his statement (R. 795) that the Board of Trade opposed the milling in transit limitation and the submission of two exhibits comparing rates on corn and corn products (R. 815, 816), which simply showed a difference in rates between the two commodities, nothing more was submitted in support of the allegation that the milling in transit limitation results in a violation of section 3(1).

The principles applicable to the determination of whether a rate on a particular commodity creates an "undue preference or prejudice" are well established. Not all preference an prejudice is prohibited by section 3(1); only those which are "undue" or "unreasonable". *United States* v. *Wabash R. Co.*, 321 U.S. 403, 411 (1944); *United States* v. *Illinois Central R.*

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[24] This Court held in *Gibbes* v. *Zimmerman*, 290 U.S. 326, 332, "the appellant has no property, in the constitutional sense, in any particular form of remedy; all that he is guaranteed by the Fourteenth Amendment is the preservation of his substantial right to redress by some effective procedure [citations omitted]." See also *League* v. *Texas*, 184 U.S. 156, 158.

[25] It is submitted that the appellants in their attempt to avert the impact of the *Merchants* case upon section 4 proceedings by limiting it to merely an issue of proper exhaustion of administrative remedies, over simplifies the comprehensive discussion by Mr. Justice Brandeis.

R., 263 U.S. 515, 521 (1924); *Texas & Pacific Ry.* v. *Interstate Commerce Commission*, 162 U.S. 197, 219–220 (1896). In the latter case this Court held (p. 219): *"The mere circumstance that there is, in a given case, a preference or an advantage does not of itself show that such preference or advantage is undue or unreasonable within the meaning of the Act."*

Whether a given rate results in an undue preference or prejudice is essentially a question of fact to be determined by the Commission. *Board of Trade of Kansas City* v. *United States*, 314 U.S. 534, 546 (1942); *New York* v. *United States*, 331 U.S. 284, 347 (1947); the Supreme Court in *Swayne & Hoyt, Ltd.* v. *United States*, 300 U.S. 297, 304, said: "* * * Whether a discrimination in rates or services of a carrier is undue or unreasonable has always been regarded as peculiarly a question committed to the judgment of the administrative body, based upon application of all the facts and circumstances affecting the traffic." "How much weight shall be given to each must necessarily be left to it [the Commission]." *United States* v. *Illinois Central R. R., supra*, p. 524.

In order to establish undue preference and prejudice, it must be shown among other things that different rates are charged for substantially similar services under similar transportation conditions; and that this disparity has injured the party prejudiced and benefited the party preferred. *United States* v. *Wabash R. Co.*, 321 U.S. 403; *Texas & Pacific Ry.* v. *United States*, 162 U.S. 197; *United States* v. *Illinois Central R.R.*, 263 U.S. 515. Undue prejudice cannot be predicated upon a mere existence of a difference in

rates and some evidence of competition. "Differences in conditions may justify differences in carrier rates or services" *United States* v. *Wabash R. Co.*, 321 U.S. 403, 411. The mere fact that the application of competitive all-rail through rates result in a higher rate on whole corn is not, without more, sufficient to show a violation of section 3(1). *Interstate Commerce Commission* v. *Chicago Great Western Railway Company*, 209 U.S. 109 (1908).[20]

Although a NYC witness said that similar competitive conditions apply to whole corn and corn milled in transit (R. 367), this is not enough to overcome the deficiencies in the Board of Trade's case. Moreover, as we have noted, *supra*, this limitation applies equally to the Kankakee shipper of whole corn as well as to the Chicago shipper.

While the NYC stated that it intended to remove the milling in transit limitation, this is strictly a matter within its managerial discretion. *Interstate Commerce Commission* v. *New York, N.H. & H.R. Co.*, 372 U.S. 744, 759. There is no requirement that it must be removed, at least not until it has been demonstrated by

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[20] Chamber of Commerce, *Houston* v. *S. P. Co.*, 49 I.C.C. 316, 318–319, peanut oil over peanuts; *Dahlstrom Metallic Door Co.* v. *E. R. R. Co.*, 155 I.C.C. 402, 406–407, sheet metal work over sheet metal; *Pacific Coast Steel Co.* v. *Director General*, 62 I.C.C. 207, ingots over manufactured iron and steel articles; *Crown Willamette Paper Co.* v. *D.G.*, 78 I.C.C. 273, 277 and *Minnesota & Ontario Paper Co.* v. *D.G.*, 93 I.C.C. 105, 108, wood pulp over paper. In the latter case the Commission held, "* * * although we have condemned rates on raw materials higher than on the products manufactured therefrom, it does not necessarily follow from a showing that rates on wood pulp are higher than those on certain kinds of paper that the former rates are unreasonable in and of themselves."

relevant facts in an appropriate proceeding before the Commission that the milling in transit limitation causes "undue or unreasonable preference or advantage" and "undue or unreasonable prejudice or disadvantage." *United States* v. *Wabash R. Co.*, 321 U.S. 403.[27] Although the Commission refers to the NYC intention to remove the milling in transit limitation (R. 27), it is apparent that the Commission did not consider the matter material to the issue before it since it merely stated that (R. 27), "these issues do not directly deal with the fourth section principles here involved, but are properly matters which may be raised in investigation or complaint proceedings."

While the Commission did not rule upon the Board of Trade's contentions of section 3(1) violations, the Commission did not ignore the evidence or the contentions because it found that (R. 27) "there is no indication of undue damage to Chicago." In view of lack of evidence to support the Board of Trade's contentions, no other finding is warranted."[28]

In view of what we have said above it is clear that the Commission is not required to convert a proceed-

[27] The record indicates that the milling in transit limitation would be eliminated after final disposition of the present fourth section application proceeding (R. 389, 562).

[28] Cf. *Grain and Grain Products Within The Western District*, 284 I.C.C. 723, (1952). The Board of Trade alleged that the failure to grant transit at Chicago constituted an unreasonable practice and undue preference and prejudice in violation of section 3(1) and section 4. The Commission held (p. 731): "The granting of transit at one point and not on another on the same route, * * * does not contravene section 4. * * * The present record affords no proper basis for determination of the issues presented under sections 1 and 3."

ing limited to the issues of section 4 into a full scale rate investigation even though some evidence on irrelevant issues has been admitted into the record. This applies equally to the allegations of section 3(4) violations by Mechling which as shown *supra* do not result from the fourth section order entered by the Commission. *Transamerican Freight Lines* v. *United States*, 51 F. Supp. 405, 412 (D. of Del. 1943); *Nelson, Inc.* v. *United States*, 355 U.S. 554, 561–562 (1958); *Scott Truck Lines, Inc.* v. *United States*, 163 F. Supp. 118; cf. *Eastern Air Lines* v. *C.A.B.*, 243 F. 2d 607. Whether the Commission should enlarge the scope of a section 4 proceeding beyond the requirements of the statute is committed by law to the discretion of the Commission. See section 17(3) of the Interstate Commerce Act, 49 U.S.C. section 17(3);[29] *Brotherhood of Maintenance of Way Employees, et al.* v. *United States and Interstate Commerce Commission*, 221 F. Supp. 19 (D.C.E.D. Mich., 1963), aff'd per curiam Nos. 510 and 511 this term, Dec. 9, 1964; *United States* v. *Northern Pacific Ry.*, 288 U.S. 490, 501–502 (1953); *Railway Express Agency* v. *United States*, 205 F. Supp. 831, 835 (S.D.N.Y., 1962); *American Trucking Association* v. *United States*, 326 U.S. 77, 83 (1945); *Federal Comm'n* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138. *United States* v. *Pierce Auto Lines*, 327 U.S. 515, 523 (1946). An analysis of the evidence submitted by the Board of

[29] The pertinent provisions of section 17(3) are as follows:

The Commission shall conduct its proceedings under any provision of law in such manner as will best conduce to the proper dispatch of business and to the ends of justice.

Trade shows that the Commission properly exercised its discretion. The Commission has made the appropriate findings relevant to the fourth section issue before it and as the district court found, those findings are (R. 80) "based on substantial evidence, and that no prejudicial error occurred in the hearings before the Examiner and Commission." "This is all the statute requires." *Community & Johnson Corp.* v. *United States,* 156 F. Supp. 440, 443 (S.D.N.J. 1957); *Capital Transit Co.* v. *United States,* 97 F. Supp. 614, 621 (D.C.D.C., 1951).

II

Based upon substantial evidence of record, the Commission properly found on the basis of the through rates that the proposed rates are not lower than necessary to meet the barge-rail competition, and that the proposed rates do not constitute a destructive competitive practice

Before the Commission can permit the exception to the long and short haul provision to operate, it is required to find (1) that a special case exists and (2) that the charge to or from the more distant point is reasonably compensatory. As to the first statutory finding, the record leaves no doubt that the almost complete elimination of the rail carrier from participation in the transportation of corn traffic from points on the Belt Line to the east resulting from the far lower barge-rail rate required a reduction in the all-rail rate from Belt Line points. The United States in its memorandum in response to this Court's request for comments upon the

Jurisdictional Statements filed by the appellants stated (p. 17, ftn.):

> Appellants in No. 746 also raise an additional issue as to whether there is substantial evidence to support the finding that a "special case" exists authorizing the proposed rates in question. We do not believe that any real issue is presented as to whether "compelling competition" warranting the finding of a special case exists. The record shows clearly that virtually all rail traffic from points on the Belt Line to Chicago and Kankakee had been diverted from the railroads to the barges.

The more recent brief of the United States does not appear to alter this statement. Significantly, the record shows that no one disputed the existence of a special case by virtue of compelling competition brought about by the much lower barge-rail rates."

After conceding that the Commission properly determined that the entire through rate is reasonably compensatory, the United States abruptly faces about and contends that the proportional rate factor from Belt origin to Kankakee amounts to a destructive competitive practice citing for its authority the National Transportation Policy, 49 U.S.C. preceding section 1 and this court's recent opinion in *Interstate*

" On the issue of whether a "special case" existed, the district court found (R. 78–79):

> * * * The record is replete with exhibits and testimony which show that prior to the changed rate almost all free corn, as distinguished from government corn, grown in the geographical area involved was shipped via barge to Chicago and thence by rail to its eastern termini. This obvious disparity of corn shipment was found to exist by the Hearing Examiner and the Commission. 310 I.C.C. 438–441. * * *

Commerce Commission v. *New York, New Haven & Hartford R. Co.*, 372 U.S. 744 (1963). The logic of this contention escapes us for it completely ignores the Commission's long established test used in determining the measure of a reasonably compensatory rate within the meaning of section 4.

In *Transcontinental Cases of 1922*, 74 I.C.C. 48, the Commission defined a reasonably compensatory rate in the following terms (p. 71):

> * * * We are of the opinion and find that in the administration of the fourth section the words "reasonably compensatory" imply that a rate properly so described must (1) cover and more than cover the extra or additional expenses incurred in handling the traffic to which it applies; (2) *be no lower than necessary to meet existing competition;* (3) *not be so low as to threaten the extinction of legitimate competition by water carriers;* and (4) not impose an undue burden on other traffic or jeopardize the appropriate return on the value of carrier property generally, as contemplated in section 15(a) of the act. (Emphasis supplied.)

The National Transportation Policy, insofar as it condemns unfair or destructive competitive practices, merely restates in general terms the more specific standards which the Commission for almost half a century has applied in section 4 proceedings involving rail-water competition.

After exhaustively treating the evidence of record dealing with comparative earnings, rate levels and operating conditions adduced in support of the pro-

posed adjustment (R. 22–25); and upon consideration of the evidence of the actual movement of the traffic during the nine-month period after the rate adjustment became effective in December, 1956, the Commission found that (R. 29) "the proposed rates are not lower than necessary to meet the competition, [and] do not constitute a destructive competitive practice."

The United States urges that the Commission's finding is not supported by any evidence or economic analysis (Br. U.S., p. 34). The district court which had available the complete record made before the Commission as well as the contentions of the parties below apparently had no difficulty in ascertaining and concluding that the Commission's findings were supported by substantial evidence. The district court after referring to the tests set forth in the *Transcontinental Cases of 1922* as being judicially approved held (R. 79–80):

> * * * In the instant case comparative earnings, rate levels and operating costs were submitted to support the compensativeness of the proposed rate. 310 I.C.C. 437, 448–449. This was a proper formula to support the Commission's finding. *Fed. Power Comm'n* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 586 (1942); *United States* v. *Northern Pacific Ry. Co.*, 288 U.S. 490, 500 (1933); *Youngstown Sheet & Tube Co.* v. *United States*, 295 U.S. 476, 480 (1935); *City of Harrisonburg* v. *Chesapeake & O. Ry. Co.*, 34 F. Supp. 640, 644–645 (D. C. Va., 1940); *Tidewater Associated Oil Co.* v. *A.T. & S.F. Ry. Co.*, 278 I.C.C. 586, 589; *Summer Co.* v. *Erie R. Co.*, 262 I.C.C. 43, 46. In finding that

> the rate was no lower than necessary, the Commission also examined the bid prices of the two modes of transportation and the effect they had on those country elevators located between the Illinois River and the Belt. In finding that the rate was not destructive of competition nor unduly burdensome, the Commission had before it evidence of the amount of corn shipped via the two modes of transportation in the periods here in question.

Thereafter the district court found (R. 80):

> There is no challenge of the detailed facts underlying the findings or conclusions and we find that there is the requisite substantial basis for the findings and conclusions. *Rochester Tel. Corp.* v. *United States*, 307 U.S. 125, 140.
>
> We conclude that the order in question was within the statutory power of the Commission, that it is supported by findings and conclusions based on substantial evidence, and that no prejudicial error occurred in the hearings before the Examiner and Commission. For these reasons we think the complaint should be dismissed. The order of dismissal is being entered this day.

We submit that the district court's conclusions are correct, especially when consideration is given to the fact that no one has assailed the through rate as not being reasonably compensatory. Moreover, the United States having admitted that the Commission had properly rejected the contention that the 6-cent proportional rate factor should have been used as the basis for determining whether the through rate was reasonably compensatory, cannot now be heard to

allege that the Commission erred in failing to determine whether the same proportional rate factor, standing alone, constituted a destructive competitive practice within the meaning of the National Transportation Policy. We submit that the tests set forth in the *Transcontinental Cases of 1922, supra*, are reflected in the National Transportation Policy, and that the latter does not create any additional standards than those which the Commission has applied for many years in section 4 proceedings.

Implicit in the position taken by the United States is the presumption that the NYC had deliberately schemed to publish a reduced rate knowing that it would lose money on each movement from origins on the Belt Line via Kankakee for the sole purpose of driving the barge lines out of business. Perhaps the hypothetical situation described by the United States (Br. U.S., p. 33) could lead to destructive competitive practices, but the facts in this case offer no support at all to such a conclusion.

In *Interstate Commerce Commission* v. *New York, New Haven & Hartford R. Co.*, 372 U.S. 744, this Court stated (p. 759):

> * * * If there is one fact that stands out in bold relief in the legislative history of § 15a(3), it is that Congress did not regard the setting of a rate at a particular level as constituting an unfair or destructive competitive practice *simply* because that rate would divert some or all of the traffic from a competing mode. Moreover, neither the Commission representative nor the witness who testified on behalf of the appellant carriers (supra, pp. 754–756) took this po-

sition, since they too recognized that such an interpretation would be inconsistent with the mandate of the National Transportation Policy to "preserve the inherent advantages of *each*" mode of transportation. If a carrier is prohibited from establishing a reduced rate that is not detrimental to its own revenue requirements merely because the rate will divert traffic from others, then the carrier is thwarted from asserting its own inherent advantages of cost and service. Nor should the selective character of such a rate reduction, made in response to a particular competitive situation, be permitted, without more, to furnish a basis for rejecting the rate. Section 15a(3), in other words, made it clear that something more than even hard competition must be shown before a particular rate can be deemed unfair or destructive. *The principal purpose of the reference to the National Transportation Policy, as we have seen, was to prevent a carrier from setting a rate which would impair or destroy the inherent advantages of a competing carrier, for example, by setting a rate, below its own fully distributed costs, which would force a competitor with a cost advantage on particular transportation to establish an unprofitable rate in order to attract traffic.* (Emphasis supplied.)

In this case the Commission found that Mechling's fully distributed costs for the transportation of corn from the six most competitive ports to Chicago was 4.4 cents per hundred pounds (R. 26, see also R. 632 and Mechling Br., p. 12). The average barge rate on the Illinois River prior to December, 1957 was 4.625

cents per hundred pounds which is .225 cents above the fully distributed costs. In December, 1957, about a year after the NYC reduced rate became effective, and after experiencing about 12 months of competition, Mechling in December 1957 increased its rates by .2 cents per hundred pounds, thus further increasing its spread over its maximum fully distributed costs. This is indeed a most unusual way in which to meet a reduced rate alleged to be a destructive competitive practice under any theory of law or economics. Moreover, despite the restoration of effective competition, there was a substantial increase in the barge traffic to Chicago during the critical period December 15, 1956 to August 30, 1957 of about 90,000 tons over a corresponding period for the previous year. There was an increase in the amount of rail traffic originated on the Belt Line for a similar period.[21] This is precisely what the reduced rate was supposed to do. *Interstate Commerce Commission* v. *New York, N. H. & H. R. Co., supra,* p. 759; *Skinner & Eddy Corp.* v. *United States,* 249 U.S. 557, 568 (1919).

After analysis of the corn movement in the Belt Line territory during the critical period when the reduced all-rail rate was in effect, the Commission concluded (R. 28): "It is apparent that while corn grown adjacent to the Belt was attracted to the rails, that grown adja-

[21] For the period December 15, 1955–August 30, 1956, the barge shipments to Chicago amounted to 402,105 tons. It rose to 493,668 tons for the same period the following year. The 6-, 8-, and 12-month periods ending June 30, August 31, and December 31, 1957, show that Belt Line traffic progressively increased from 1,915 carloads of corn to 2,681 carloads (R. 13–14, 28).

cent to the river remained with the barges. Thus, it is evident that the proposed rates are not lower than necessary to meet the barge competition." We submit that a reduced rate with the following characteristics (1) enables a competing carrier to participate in the transportation of a specific type of traffic; (2) permits the barge-line to maintain rates above maximum fully distributed costs and even to increase its rates; (3) which does not result in a loss of the level of traffic to the barge lines, (4) which destroys a monopoly and fosters competition to the benefit of farmers and shippers in an area where competition no longer existed, cannot be labeled as a destructive competitive practice or "competition that kills"; *Skinner & Eddy Corp.* v. *United States, supra* at p. 568. It is apparent that Mechling can meet the all-rail rate and still recover its fully distributed costs.

Another reason given by the United States in support of its allegation that the proportional rate factor appears to be predatory and in contravention of the National Transportation Policy is its assertion that the 5½-cent proportional rate factor had not been shown to be remunerative.[12] Apparently the United

[12] The United States implies (U.S. Br., p. 31) that the Commission had adopted the examiner's finding that the proposed 5½-cent proportional rate was somewhat lower than the adjusted out of pocket costs of the railroad. The Commission specifically did not adopt this finding of the examiner because the study upon which figures were based was limited solely to the inbound rate and failed to take into consideration that it could only be used in determining the through all-rail rate (R. 25). Consequently, there is no basis for the conclusion of the United States that it is beyond dispute that the Belt Line portion of any through transportation under the new rate is not remunerative.

States takes this position on the unwarranted and unsupported theory that the NYC transports corn from Chicago to Kankakee, destined to the east, either free or at a loss. Therefore, the United States concludes that any savings gained by the NYC through the use of the more direct route to the east from Belt origins via Kankakee rather than the more costly route from Chicago to Kankakee is not added revenue but merely a reduction in the NYC's losses.

This allegation like the prior one is without merit because it fails to take into consideration the entire through transportation over which costs and revenue should be spread.[35] The United States apparently believes that a cost study by the rail carrier is a *sine qua non* before a reduced rate may be shown reasonably compensatory. In answer to a question as to the failure of the rail carriers to submit a cost study, the NYC witness stated (R. 320):

> Well, it was self evident to me that this 5½ cent rate plus what I saved on the absorption charge at Chicago netted me 7½ cents more than if I handled this traffic from Chicago, so you don't have to be a cost expert to see when you can make $80 to $85 additional and for handling a car lesser distance, that it is profitable.

The rail carriers submitted comparisons of rates and earnings for similar services in the same or adjacent territories to show that the proposed reduced rates were reasonably compensatory. This has always been

[35] The reshipping rates, 49 cents on corn and 49.5 cents on corn products applies from Chicago to the east including routing through Kankakee (R. 303).

considered probative evidence as to the lawfulness of rates in issue. *United States* v. *Northern Pacific Ry.*, 288 U.S. 490, 500; *Youngstown Sheet & Tube Co.* v. *United States*, 295 U.S. 476, 480. The Commission found that under the proposed rates the revenues of the NYC are increased by 7.5 cents per 100 pounds over its prior method of handling corn from Chicago, and that its expenses are reduced to the extent that corn from Belt origins can move direct to eastern destinations (R. 24–25). This finding does not show a reduction in losses—what it shows is an addition to revenues. From the foregoing there is no basis for the allegation that the proposed rates are non-remunerative.

The record in this case demonstrates that the proposed reduced rates are neither predatory nor in contravention of the National Transportation Policy. Mechling contends (Mechling Br., p. 42) that the result of the Commission's action is to cause a disruption of a long standing rail rate structure in Northern Illinois. A similar allegation by this Commission was rejected by this Court in *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the district court should be affirmed.

Respectfully submitted.

ROBERT W. GINNANE,
General Counsel,
H. NEIL GARSON,
Associate General Counsel,
Interstate Commerce Commission,
Washington 25, D.C.

JANUARY 1964.

APPENDIX

The National Transportation Policy, 49 U.S.C. preceding section 1, provides:

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation service, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Section 3(1), 49 U.S.C. 3(1), provides:

> It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm,

corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

Section 3(4), 49 U.S.C. 3(4), provides:

All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term "connecting line" means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III.

Section 4(1), 49 U.S.C. 4(1), provides:

It shall be unlawful for any common carrier subject to this part or part III to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this part or part III, but this shall not be construed as authorizing any common carrier within the terms of this part or part III to charge or receive

as great compensation for a shorter as for a longer distance: *Provided,* That upon application to the Commission and after investigation, such carrier, in special cases, may be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property, and the Commission may from time to time prescribe the extent to which such designated carriers may be relieved from the operation of the foregoing provisions of this section, but in exercising the authority conferred upon it in this proviso, the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and no such authorization shall be granted on account of merely potential water competition not actually in existence: *Provided further,* That any such carrier or carriers operating over a circuitous line or route may, subject only to the standards of lawfulness set forth in other provisions of this part or part III and without further authorization, meet the charges of such carrier or carriers of the same type operating over a more direct line or route, to or from the competitive points, provided that rates so established over circuitous routes shall not be evidence on the issue of the compensatory character of rates involved in other proceedings: *And provided further,* That tariffs proposing rates subject to the provisions of this paragraph requiring Commission authorization may be filed when application is made to the Commission under the provisions hereof, and in the event such application is approved, the Commission shall permit such tariffs to become effective upon one day's notice.

Section 13(1), 49 U.S.C. 13(1), provides:

That any person, firm, corporation, company, or association, or any mercantile, agricultural or manufacturing society or other organization,

or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this part, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

Section 15(7), 49 U.S.C. 15(7), provides:

Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification of any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and

delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after the date this amendatory provision takes effect, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

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No. 59

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

BOARD OF TRADE OF THE CITY OF CHICAGO,
Appellant,

vs.

UNITED STATES, ET AL.

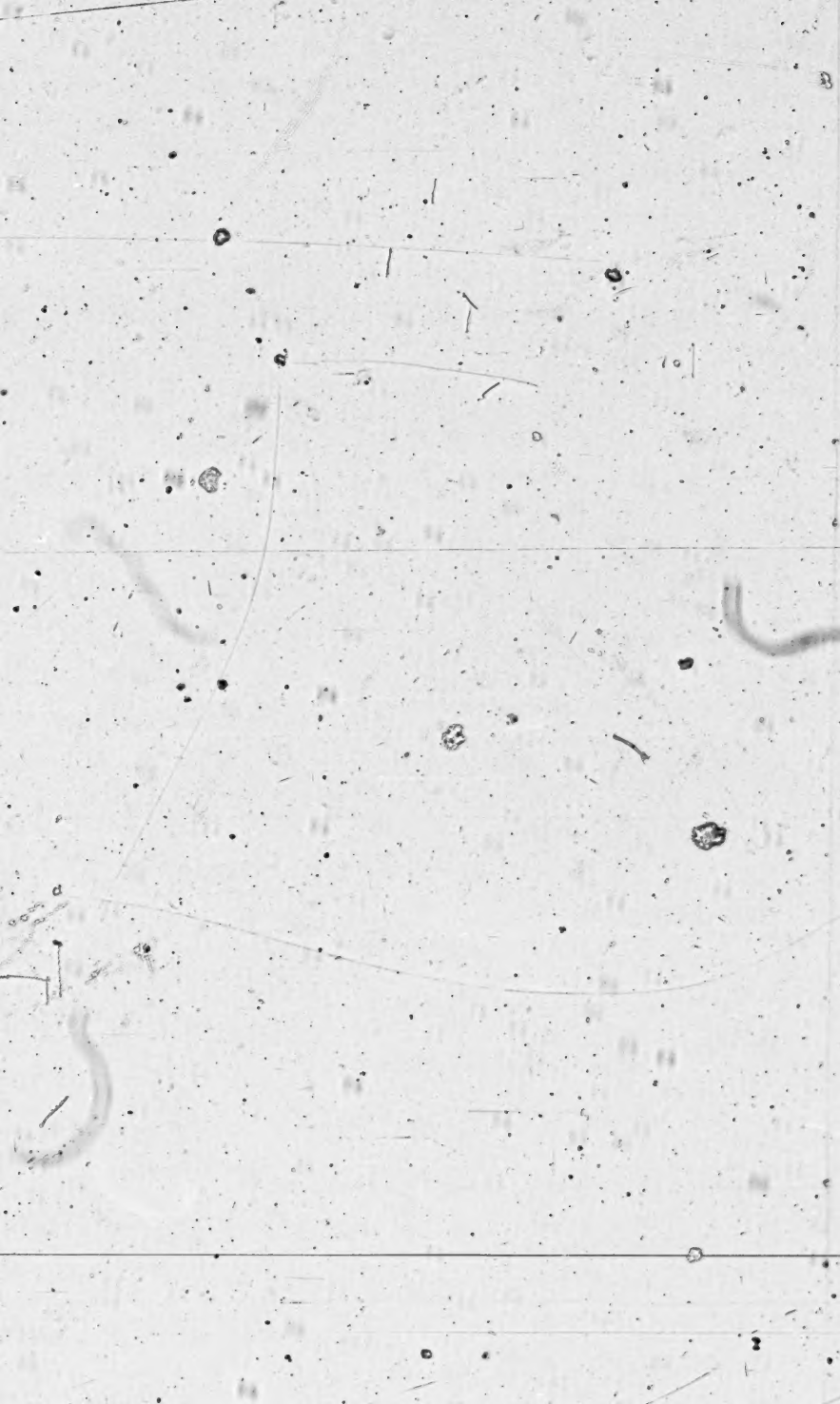
ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

REPLY BRIEF OF APPELLANT BOARD OF TRADE OF THE CITY OF CHICAGO

HAROLD E. SPENCER
RICHARD M. FREEMAN
One North LaSalle Street
Chicago 2, Illinois
Counsel for Board of Trade of the City of Chicago, Appellant

BELNAP, SPENCER, HARDY & FREEMAN
One North LaSalle Street
Chicago 2, Illinois
Of Counsel

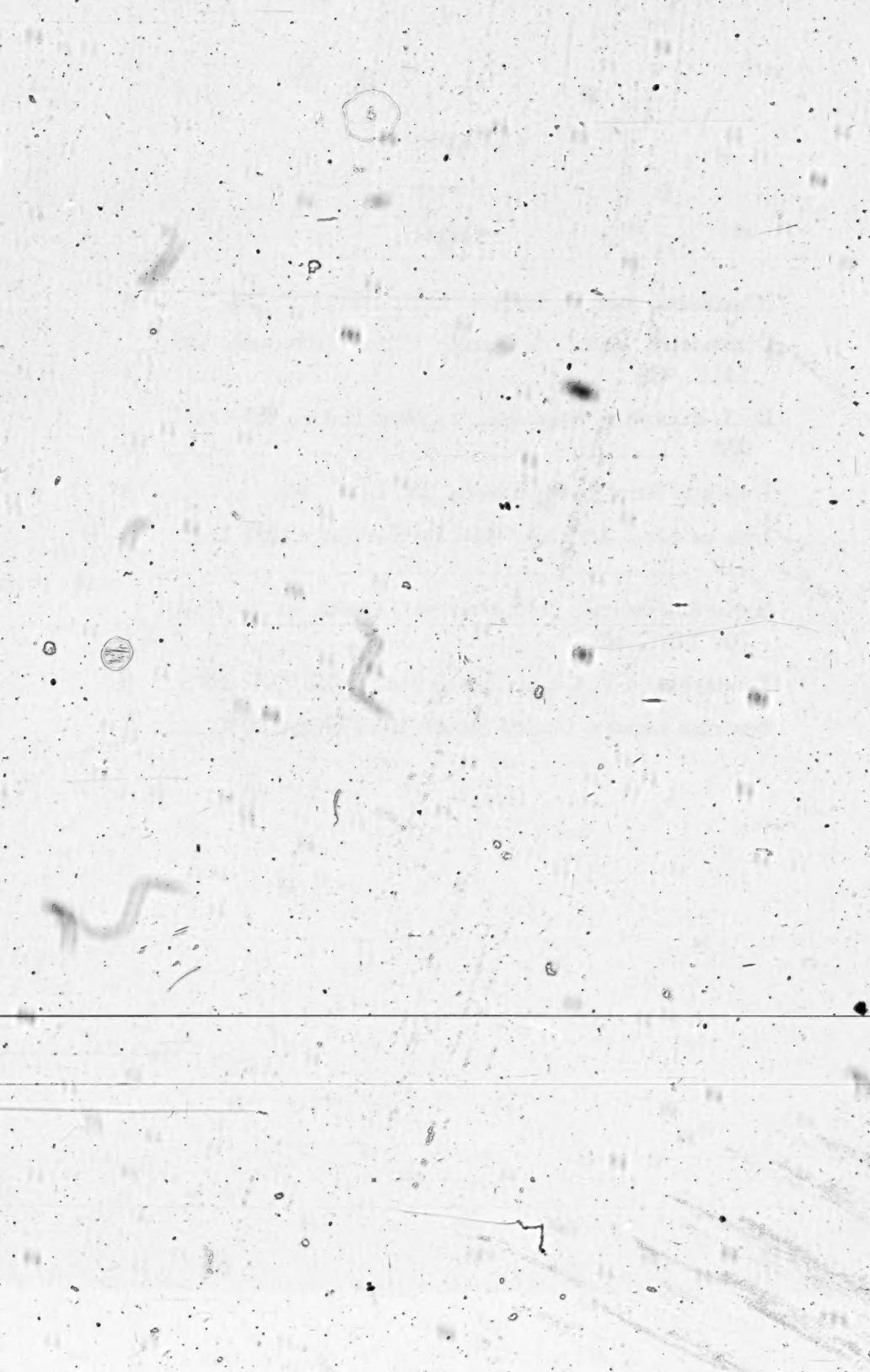
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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REPLY BRIEF OF APPELLANT BOARD OF TRADE OF THE CITY OF CHICAGO

The Board of Trade of the City of Chicago (Board of Trade) is concerned with only the one question raised by this appeal:

> May the Interstate Commerce Commission, over the protest of affected shippers and localities, authorize rail carriers to maintain rates which depart from the long-and-short-haul requirement of section 4 of the Interstate Commerce Act, without considering and

> determining whether such fourth-section-departure rates would violate section 3(1) of the Act by causing undue prejudice against such shippers and localities?

It is the position of the Board of Trade that the answer to that question is "no".

The United States, the statutory defendant in the court below, is nominally an appellee; but, as we understand the position of the United States, it supports generally the position taken by the Board of Trade. The appellees who oppose the position of the Board of Trade are the Interstate Commerce Commission (the Commission), the New York Central Railroad Company (NYC) and McNabb Grain Company, et al (McNabb). While most of the contentions urged by appellees have been considered in appellant's brief, certain features of appellees' arguments require brief discussion by appellant.

I

In order for the Commission to enter an affirmative order relieving the railroads from the long-and-short-haul requirement of section 4 of the Interstate Commerce Act, the Commission must find that a "special case" exists. Neither the original Act to Regulate Commerce nor any subsequent amendment thereof has ever defined more specifically the criteria for determining what constitutes a special case. All that Congress has done is to specify certain situations in which the Commission may not grant fourth-section relief. Thus the Commission may not grant relief if the charge to or from the more distant point "is not reasonably compensatory for the service performed," and it may not grant relief "on account of merely potential water competition not actually in existence." But Congress has never indicated to the Commission that it *should* grant fourth-section relief simply because the rate proposed would be compensatory and the competition actual.

Appellees are unable to answer, either with authority or reason, appellant's contention that, in determining whether a "special case" exists to justify fourth-section relief, the Commission must take into consideration the standards of the other sections of the Act. Appellees' arguments on this point consist solely of assertions that, in a section 4 investigation, the Commission need not consider alleged violations of section 3. Thus their briefs contain many such statements as the following:

> . . . a fourth section proceeding which is limited to determining whether a carrier should be authorized to establish reduced through charges to the more distant points and to maintain higher through charges to intermediate points . . . (Comm. Br., p. 3)

> . . . the Commission is not required to make a final determination in respect to the lawfulness of the rates under other sections of the Act in a hearing limited, as this one was, to the railroads' fourth section application . . . (NYC Br., p. 20)

Such statements beg the question. The question is: Can a fourth-section investigation lawfully be so limited so as to deny to affected shippers and localities their right to present evidence of prejudice and discrimination and to have the Commission act on that evidence?

Faced with the fundamental question of what the carriers must show in order to establish a special case, the NYC simply ignores the question, and the Commission is reduced to the point of arguing that the carriers establish a special case simply by showing that they are confronted with "compelling competition" (Comm. Br., p. 40).

The only reasonable interpretation of the statute, confirmed by many decisions of this Court and of the Commission itself, is that the carriers do not make out a special case simply by proving the existence of actual competition, if the rates they seek to establish would be unlawful under some other section of the Act, and specif-

ically, if such rates would be discriminatory or prejudicial to competing shippers or localities in violation of section 2 or section 3. If there were any doubt that such is the correct interpretation of section 4, that doubt must necessarily be dispelled by the national transportation policy, which provides that all the provisions of the Act shall be administered and enforced with a view to carrying out that policy. The policy specifically requires the Commission to encourage the establishment of reasonable charges "without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices."

II.

Appellees argue that the cases cited by the Board of Trade should be interpreted to mean that the Commission will consider section 3 issues in a section 4 investigation only when such issues involve the relationship between the long-haul rate and an intermediate short-haul rate (Comm. Br., pp. 33-34; NYC Br., pp. 43-44).

The Commission itself has not so interpreted section 4. For example, in *Bituminous Coal to Buffalo, N. Y.*, 219 I.C.C. 554 (1936), the Commission conducted its investigation solely under section 4 and the protesting shippers were not located at intermediate points. The Commission denied relief on the ground that it would not be consonant with other provisions of the Act.[1] *Nepheline Syenite from*

[1] The NYC omitted this case and two others, *Iron and Steel To Minnesota*, 231 I.C.C. 425 (1939), and *Commodity Rates to Pacific Coast Terminals*, 107 I.C.C. 421 (1926), when it attempted to categorize the cases cited by appellant (NYC Br., pp. 47-48, footnotes 19-23). Appellees cannot deny that the Commission has adhered to the practice of considering section 3(1) issues in section 4 investigations prior to this case. Separation of the many cases into the different categories suggested by the NYC brief only serves to demonstrate the consistency of the Commission's rulings up to the present case.

Ontario, Canada, to the East, 308 I.C.C. 561 (1959), was also an investigation solely under section 4 of the Act in which the protesting shippers were not located at intermediate points. In that case the Commission authorized the relief requested after making subsidiary findings that relief was justified in the circumstances.

There is nothing in the many decisions of this Court or the Commission cited in appellant's brief which in any way suggests that the plain language of section 4 is to be construed as applying only in cases where an intermediate shipper is involved. And the distinction attempted to be made by appellees is one which could never be applied in practice. The Commission was not here dealing with one rate adjustment over the direct routes and another adjustment over the circuitous routes. The Commission had before it a single, integrated, and complex rate adjustment, under which shippers operating over many different routes were competing with each other. The Court can well imagine what would happen if the Commission tried to apply the rule suggested by its counsel that shippers located at intermediate points can, in a fourth-section investigation, raise issues of undue prejudice under section 3 but shippers on circuitous routes cannot raise such issues.

III.

The Commission seems to argue that the July 11, 1957, amendment to section 4 has a bearing on the issues here, but it is not clear to us just what effect the Commission seeks to attach to this amendment.[2] That amendment

[2] The Commission's statement (Comm. Br., p. 22, footnote 21) that the amendment reinstated regulation as it existed prior to the Mann-Elkins Act is wholly erroneous. See B.O.T. Br., pp. 15, 20).

simply provided that carriers operating over circuitous routes need secure no relief to establish charges which would otherwise violate section 4 if such charges were for the purpose of meeting charges in effect over a more direct route. It did not change in any way the proscription of charging more for a shorter haul than for a longer haul; it did not change in any way the Commission's right to grant relief from that requirement "in special cases"; and it did not establish any different criteria than had previously existed for determining what constitutes a special case. Furthermore, it contains no language which suggests or implies in any way that Congress intended to immunize fourth-section-departure rates from unlawfulness under other sections of the Act.[3] That the Commission itself has not interpreted the 1957 amendment as changing the law in this respect is shown by *Nepheline Syenite from Ontario, Canada, to the East*, 308 I.C.C. 561 (1959), *supra*, which, as we have pointed out, was solely an investigation under section 4 and the protesting shippers were not located at intermediate points.

IV.

Appellees accuse the Board of Trade of seeking a monopoly of the traffic in question (NYC Br., p. 23; McNabb Br., p. 9). Nothing could be further from the truth. The Board of Trade is a vigorous supporter of free competition subject to the fewest possible restraints. It believes that all forms of transportation should have a fair opportunity to compete for traffic, and

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[3] The original publication of rates, effective December 15, 1956, antedated the July 11, 1957, amendment. At that time, the carriers required relief over circuitous as well as direct routes. So regardless of the effect of the 1957 amendment, the December 15, 1956, publication was in violation of section 4 via all routes, direct or circuitous.

it actively supports their right to do so. It was, and is, entirely sympathetic to the efforts of the railroads to meet their competition (R. 292, 795). But the Board insists that the railroads must meet their competition in a lawful manner. The milling-in-transit limitation is a gross discrimination against Chicago and Chicago grain merchants, because it precludes them from buying corn off the Kankakee Belt line, and makes that area the private buying preserve of the Kankakee processor and a few other processors who route their traffic through Kankakee. It is those processors who seek a monopoly of the corn off the Kankakee Belt. The Board of Trade seeks to eliminate that monopoly so that all corn buyers, including Chicago grain merchants, can buy and transport corn off the Kankakee Belt on an equality with the now unduly preferred processors.

V.

Appellees admit that the Commission did not rule upon the Board of Trade's contentions that the proposed rates would violate section 3 (Comm. Br., p. 37; NYC Br., p. 27).[4] Nevertheless, they devote a substantial amount of their

[4] Indeed, the Commission has now unequivocally committed itself to the position that it will not consider, in a section 4 investigation, whether the fourth-section-departure rates would result in violations of section 3. *Iron or Steel Articles—East to Southwest*, 321 I.C.C. 419. The decision in that case, released January 17, 1964, was the aftermath of the decision in *Seatrain Lines* v. *United States*, 168 F. Supp. 819 (1958). After the decision of the three-judge court, the Commission suspended the rates. It is interesting to note that, although the proceeding bears an investigation and suspension docket number, the Commission held that it was not "an investigation pursuant to the provisions of sections 13 or 15" since the rates were suspended because of the court's order and therefore the Commission was "precluded from consideration of discrimination against carriers, which is prohibited by section 3(4)." 321 I.C.C. at 422.

briefs to dealing with the merits of the Board of Trade's contentions. Since the merits of the issue are not before the Court, we will not deal with those points in any detail.

The Commission says that, to establish preference and prejudice, it must be shown that different rates are charged for substantially similar services under similar transportation conditions and that such disparity has injured the prejudiced party and benefited the preferred party (Comm. Br., p. 35). The Board of Trade made such a showing. The disparity of rates is admitted. The movement of "free" (non-CCC) corn to Chicago from Kankakee Belt origins fell from 273 cars in the 10-month period before the restricted fourth-section departure rates became effective to only 46 cars for the same period after such rates became effective (Ex. 49, p. 6), even though the total cars of corn originated on the Kankakee Belt were many times greater after the fourth-section-departure rates became effective. And the NYC witness admitted that the same competitive conditions apply to whole corn as apply to processed corn (R. 367).

The Commission tries to obfuscate the section 3(1) issue by arguing that the Board of Trade's showing was not sufficient because the milling-in-transit limitation applied equally to the Kankakee shipper of whole corn as well as to the Chicago shipper (Comm. Br., p. 36). But the Kankakee shipper does not ship whole corn. He ships corn products. Because he is a processor the milling-in-transit requirement does not hurt him. On the contrary, it helps him by precluding the Chicago grain merchants from buying corn off the Kankakee Belt. The railroads have no right to make this kind of a restriction to benefit a small group of processors. Their duty is to haul the corn for everybody on non-discriminatory rates. It is not within their

province to say who shall be allowed to buy corn originating on the Kankakee Belt. In *D. A. Stickell & Sons, Inc.*, v. *Alton R. Co.*, 255 I.C.C. 333, 337 (1943) the Commission said:

> It is not the province of railroads to determine what markets shall be available to sellers or buyers, or, by the refusal to establish through routes or the maintenance of rate disadvantages, to restrict or circumscribe the opportunities to shippers located on other railroads to sell in markets served by them. It is their function to transport in the channels necessitated by trade conditions and not to fix limitations on commerce. The public interest demands that all shippers be accorded relatively equal opportunities to reach all reasonably available markets.

The order of the Commission in that case was affirmed by this Court in *Pennsylvania R. Co.* v. *United States*, 323 U.S. 588 (1945).

Respectfully submitted,

HAROLD E. SPENCER
RICHARD M. FREEMAN
One North LaSalle Street
Chicago 2, Illinois
Counsel for Board of Trade of the City of Chicago, Appellant

BELNAP, SPENCER, HARDY & FREEMAN
One North LaSalle Street
Chicago 2, Illinois
Of Counsel

February 14, 1964

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

A. L. MECHLING BARGE LINES INC., ET AL.,
Plaintiffs-Appellants,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Defendants-Appellees.

BOARD OF TRADE OF CITY OF CHICAGO,
Appellant,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Appellees.

On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

REPLY BRIEF OF PLAINTIFFS-APPELLANTS.

EDWARD B. HAYES
WILBUR S. LEGG
Attorneys for Plaintiffs-Appellants

Date Due: February 17, 1964

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REPLY BRIEF OF PLAINTIFFS-APPELLANTS.

Introduction—The briefs filed herein on behalf of the Interstate Commerce Commission and the New York Central Railroad Company (the "Commission" and the "NYC," respectively) have largely concentrated on the contention that the Commission need not consider viola-

tions of sections of the Interstate Commerce Act by rates in a proceeding under Section 4 of the Act in which the Commission authorizes such rates to be charged by applicant carriers. Here they have attempted a rationalization not attempted by the Commission, *viz.*, that the fact that Chicago is not on many of the direct routes *from Kankakee* to the east somehow should change the Commission's admitted policy of considering in fourth section proceedings all allegations and evidence of illegality of the rates under other sections of the Act. To a certain extent these parties then retreat from that position and attempt to introduce "findings" in their briefs *on those issues under other sections* which they wish had been, but were not, made by the Commission in its order.

Their defense on the non-compensatory 5½¢ rate rests almost entirely on the Solicitor-General's statement at page 31 of his brief of his agreement with the Commission in construing the proviso in Section 4 requiring that *any* charge to or *from* the more distant point be compensatory.[1] They give no citation of authority nor any refer-

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[1] The NYC (NYC Br.,p.26) urges that the Commission had not found that the NYC's out-of-pocket costs into Kankakee were 8.56¢ per cewt. on the average 55-ton load hauled for the weighted average distance of 38.3 miles. The Commission's finding at R.25 is categorical and without reservation:

> "On the average 55 ton load, the out-of-pocket costs of the New York Central and the eastern district railroads are 8.56 and 8.57 cents per 100 pounds, respectively, for the weighted average distance of 38.3 miles."

Thus, the Commission found that the NYC's out-of-pocket costs were an amount exceeding the 5-½¢ rate.

This finding, and the finding on fully-distributed costs (R.26), are a complete answer to the attempt of NYC's counsel (Br. 17) and of McNabb Grain Company's counsel (on pages 31-32 of his brief) to discredit an exhaustive

ence to the legislative history of the Transportation Act of 1920, of which the proviso of Section 4 was part. (Please see our "Reply to Interstate Commerce Commission's Motion To Affirm," pages 4-6, and our Plaintiffs-Appellants' Brief, pages 23-25.) Amazingly, the NYC has referred only to cases construing Section 4 as it stood *prior to the enactment of the proviso* in the Transportation Act of 1920 (NYC Br., p. 34).

Neither the NYC nor the Commission even attempts to show that the Commission made adequate findings on the effect of the 5½¢ rate on the net revenues of the applicant railroads *as a group.*[2] The argument of the NYC is cen-

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[1] (Continued)
cost study which was refined to take account of the way train handling of traffic on the Belt, the special services required in handling grain as compared to average traffic, the necessity to transport empty cars to the Belt stations because no grain cars ever were emptied there, the average length of haul, the high average loading of the cars, the additional increase in operating expenses and material prices in 1957, as shown in the railroads' rate increase requests, and the elimination of certain interchange costs (R.595-599).

Any further refinement lay entirely within the NYC's power, and it introduced no evidence of these costs, despite its burden of proving the rates compensatory.

[2] In considering what is a reasonably compensatory rate *under the fourth section*, the Commission points out in the leading case under the Act of 1920:

> "Moreover, the requirements of Section 15(a) may not be defeated or jeopardized by the action of particular rail carriers seeking to augment their own net earnings irrespective of the effect of rate changes adverse to the carriers of the country generally, or of a large territorial group. *Trunk Line and Ex-Lake Iron Ore Rates*, 69 I.C.C. 589, It clearly would defeat the intent of Congress to foster transportation by rail and water in full vigor if the rail carriers were permitted, at practically little or no profit to themselves, to operate so as to deprive water carriers of traffic which the water carriers would naturally handle." *Transcontinental Cases of 1922*, 74 I.C.C. 48, 70-71 (1922).

tered entirely on the effect of the rate on the NYC alone and the use of the corn entirely at Kankakee, ignoring the other railroad applicants and the use of corn from the Belt for processing or consumption at places other than Kankakee, and the sale in the east of products milled at Kankakee (on the all-rail route) in competition with products milled at other points, such as Chicago (on the barge-rail route).

The brief for McNabb Grain Company is so replete with misstatements of the record (some apparent on their face and others apparent only from checking the brief's sometimes whimsical citations to the record) and with extraordinary *non sequiturs* drawn from its review of frequently non-existent "evidence" that a detailed listing of these errors would extend this reply beyond appropriate limits.[3] It does not offer any consideration of the points

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[3] As an example, it is stated in the brief (p. 36) that in arriving at the price paid the farmer "the amount deducted (by the river elevators for transportation, however, was not the actual shipping cost, *i.e.*, the barge charge of 4.625 cents per cwt., but the 'Illinois proportional', a 'paper' rail rate ranging from 16-½ to 23 cents." No citation to the record appears. The statement is completely unsupported, and untrue. An earlier ambiguous statement to like effect (which, as written, could apply to rail or to barge bids) appears at pages 8-9 of that brief, but the record citations given there refer only to *rail* bids, with the significant exception that at R.750 Witness Adam testifies that the basis of buying barge corn to arrive in Chicago is "CIF Chicago, cost, insurance, and freight delivered in barges." The plain sense of "freight delivered in barges" is that *the barge freight*, not a paper rail freight, charge, is considered.

Again on page 15 counsel state that most of the absorbed switching charges listed in Exhibit 14 were not paid to NYC subsidiaries. Exhibit 14 shows that of the $5,883.62 absorbed by the NYC on cars shipped to General Foods at Kankakee from Chicago, $3,112.35 was for switching in which its subsidiaries participated and $2,771.27 was for switching in which they did not. The McNabb brief com-

of law at issue here beyond that given in the briefs of the Commission and the NYC.

Because of the new attempt at rationalization by the direct route relief argument which has been introduced into the discussion of the validity of the rates under other sections of the Act, we will consider first this question.

I. THE COMMISSION FAILED TO MAKE THE REQUIRED FINDINGS REGARDING THE VALIDITY OF THE RATE UNDER OTHER SECTIONS OF THE INTERSTATE COMMERCE ACT.

A. In Authorizing These Rates the Commission Was Required to Pass On Their Validity Under Other Sections of the Act Insofar as the Protests and Evidence Had Presented Questions Of Such Validity.

The Commission's position appears to be that it does not grant fourth section relief "where the rates proposed to be established and maintained under such an order, result in violations of other sections of the Act" (I.C.C. Br. p. 25), but that not "every allegation of rate unlawfulness, no matter how remote, is to be disposed of in a fourth section proceeding" (*Id.* p. 26). The Commission does not restate this position in dealing with the question

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[3] (Continued)
pletely ignores the NYC's generally higher switching absorptions when its own subsidiaries are involved as shown in the exhibit.

The brief also urges on page 15 that corn going to Indianapolis from Chicago must go through Kankakee. There are, of course, more direct rail routes of other applicant railroads from Chicago to Indianapolis than the NYC's route through Kankakee but, as in the discussion of the NYC's route from Chicago to Kankakee, the more direct routes of other applicants are ignored by appellees. (Cf. Note 2, *supra*). Other points, such as Toledo, also use the Kankakee Belt corn, displacing ex-barge corn from Chicago, and obviously Kankakee would not be the normal route for movements *from Chicago* to points such as these.

of discrimination against the City of Chicago, for not even the Commission could urge that these allegations of discrimination were "remote." Instead the Commission here has misstated appellants' position as requiring every fourth section proceeding to "be converted into a general rate investigation" (*Id.* p. 31) when manifestly appellants ask only consideration of points raised in duly filed protests. In footnote 22, the Commission states its position to be that:

> "There was no occasion to consolidate [*sic*] the general rate issues raised by the appellants Board of Trade and Mechling because they never did file a formal complaint under Section 13 with the Commission" (*Ibid.*).

For "consolidate" read "decide," and the Commission's position in this case is stated.

A similar position was taken on pages 32-34 with respect to the materiality of the evidence on these points, most of which had been introduced and received without any objection to its materiality.

On page 25 the Commission acknowledges its long-held rule announced in numerous decisions[4] and reported to Congress in its Annual Report of 1920 (34 I.C.C. Ann. Rep. 47) as the rule it follows in fourth section cases. But on page 31 it restricts its rule in a fashion never even hinted until *The Seatrain Lines* decision[5] was handed down ten months after this case had been heard.

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[4] See cases cited at Plaintiffs-Appellants' Brief at page 34, in Appendix B of the Board of Trade's Brief, and in footnote 5 of the Brief for the United States.

[5] *Seatrain Lines, Inc.* v. *U.S.*, 168 F. Supp. 819 (S.D. N.Y. 1958)

The Commission and the NYC urge that the orders granting, in the time-honored language of such orders, temporary fourth section relief and ordering a hearing all gave notice that formal complaints could be filed to obtain an investigation. They do not explain, however, why appellants would be warned that further complaint was necessary to obtain a hearing when the Commission had already ordered a hearing in response to appellants' protests, and the Commission's announced rule in fourth section proceedings was to deny fourth section relief if the proposed rates violated other sections of the Act as alleged in appellants' protests and supported by evidence at the hearing.

The NYC seeks to ignore these protests as framing issues in the proceeding, saying that only the application was the basis for the Commission hearing (NYC Br. pp. 35-36, 45). Such a position comports neither with the facts, the Commission's long-standing practice, good legal procedure, justice, nor the law. Factually, it can hardly be doubted that the Commission, willing to grant temporary fourth section relief without a hearing and without findings despite the protests, would have felt it unnecessary to hold a hearing on granting permanent relief had the protests not been filed raising various legal and factual issues. Procedurally, it makes no sense for a body created to deal expeditiously with substantive problems before it to adopt a new doctrine of administrative "forms of action," even more rigidly technical and compartmentalized than England's courts ever knew. In justice, even if the Commission were to adopt such a narrow procedural position for the future, it should not do so here, having given no prior warning to these appellants who relied on the many earlier pronouncements of the Com-

mission.[6] In law, it finds no justification as the Commission has frequently said in accordance with the statements of this Court, for the Commission is required by Section 12[7] of the Act to prevent all violations of the Act, no matter in what manner such violations come to its attention, provided the alleged violator has opportunity for a hearing. The Commission's action authorized these rates, after a hearing. "The provision for a hearing implies both the privilege of introducing evidence and the duty of deciding in accordance with it. To refuse to consider evidence introduced or to make an essential finding without supporting evidence is arbitrary action." *The Chicago Junction Case*, 264 U.S. 258, 265 (1924). The National Transportation Policy[8] requires all sections of the Act (including Section 4) to be construed in accordance with its terms and objectives. Is it the intent of Congress that the Commission, after such a hearing, may authorize charging a rate which it is obliged to prohibit? The Commission has said many times that this could not be the intent of Congress. See Note 4, *supra*. Furthermore, as will be seen, reasonable resolution of the questions under Section 4 required decisions on the questions under Section 3.

Finally, both the Commission and NYC appear to urge that because Chicago is not on the direct route from

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[6] The purported reliance of the NYC (NYC Br. p. 47) on restriction of the hearing is not apparent from its actions in the proceeding. In its Reply it answered on substantive, not procedural, grounds, the issues raised in the protests under other sections of the Act (R. 256, 266-269, 273-274, 275-276). Similarly, except with respect to the evidence of violations of Section 3(4) and of Mechling's costs, *no objection was made to the relevance of any of the evidence introduced on these points.*

[7] 49 U.S.C. § 12, 72 Stat. 909

[8] 49 U.S.C., Note preceding Sec. 1, 54 Stat. 898

Kankakee to eastern destinations, and "further" fourth section authorization by the Commission no longer is required for circuitous routes after the Commission authorizes departure rates over the direct route, the Commission was thereby excused from considering allegations of discrimination by Chicago and by plaintiffs-appellants. It is not only intermediate points on the relief routes that are permitted to *protest grants of fourth section relief*. Interests other than the intermediate towns are proper, even though not necessary, parties in fourth section proceedings. *Confectionery to Jacksonville, Fla.*, 272 I.C.C. 240, 241 (1948); *Confectionery to New Orleans, La.*, 273 I.C.C. 264, 265 (1948).

B. The Commission Made no Adequate Findings On the Objections To the Rates Under Sections 1(5), 3(1), 3(4) and the National Transportation Policy.

The Commission made no findings of any kind with respect to the justness and reasonableness of the non-compensatory 5½¢ rate under Section 1(5), ostensibly because it was a proportional rate. Separately-published inbound proportional rates, which this 5½¢ rate is, must comply with the requirements of the Act. *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 279 U.S. 768 (1929).

The Commission did not refer to the violation of Section 3(4), refusing even to give a reason for ignoring

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* 49 U.S.C. 4. It is the diversion of corn from northeastern Illinois to the east from the direct barge-rail route *via* Chicago, to the *all-rail route via Kankakee* under the departure rate authorized for *that* rail route, that created the Section 3(1) discrimination against Chicago. Moreover, the application specifically asked authority for the departure rate *via* direct *and* circuitous routes (R. 147-149). As to the greatly diminished movement via Chicago under the departure rates, the protestants pointed to the violation of Section 3(4).

the contention of plaintiffs-appellants despite the evidence that applicants charge 13¢ per cwt. more to haul *ex-barge* corn from Chicago to the east than they charge for the same haul if the corn is brought from Kankakee to Chicago by the NYC. (See plaintiffs-appellants' brief, pp. 31, 32) Yet inquiry into such discrimination, particularly in view of the NYC's establishment of Kankakee as an independent gateway competitive with ex-barge corn at Chicago, is required by the decisions under Section 3(4) culminating in *Arrow Transportation Company* v. *United States*, 176 F. Supp. 411 (N.D. Ala., 1959), *aff'm'd on motion sub nom. State Corporation Commission of Kansas* v. *Arrow Transportation Company*, 361 U.S. 353 (1960).

The Commission dismissed the charges of discrimination made by the Board of Trade with the pronouncement that they did not deal "directly" with the "fourth section" principles involved in the case (R. 26-27). Its only expression with respect to the milling-in-transit limitation was that the NYC had indicated a willingness to remove it. There is no reason for that expression other than that the Commission was assuming it would be removed (being discriminatory). The Commission then remarked that the proposed rates were effective over Chicago and the routes (not rates) over Kankakee were the same as they had been for many years (even though more limited in scope than those which would be available if the inbound rate break was at Chicago) and concluded that there was no indication of undue damage to Chicago (R. 27).[10] No consideration was given to the NYC's acknowledge intention to prevent Belt corn from going to Chicago and its

[10] The District Court did not review that conclusion or consider whether there were either subsidiary findings, or evidence, to support it, but dismissed it as "surplusage." (R. 77).

construction of the rate tariff to further that end (R. 320-321, 339-340, 768-769, 790-791), nor to the increase of Belt corn shipments, most of which by-passed Chicago after the departure rates were made effective (Ex. 49, R. 803). No findings made were adequate to deal with any one of the charges of discrimination made by the Board of Trade, to say nothing of all of them.

Particularly to be considered was the creation of Kankakee as a separate rate break point with a rate not made usable for Chicago, the principal corn market of the world, because of the limited list of products to which the rate was made applicable, the restricted routing from Kankakee and the milling-in-transit limitations. The application for this departure rate was for a rate that made Kankakee a new gateway, with discriminatory advantage over Chicago, and raised substantive questions on which the Commission refused to pass. *Wichita Board of Trade* v. *A. & S. Ry. Co.*, 29 I.C.C. 376, 377, 380 (1914); *Sioux City Terminal Elevator Co.* v. *C.M. & St.P.Ry.Co.*, 23 I.C.C. 98, 27 I.C.C. 457, 461-463 (1913); *Toledo Produce Exchange* v. *N.Y.C.R.R.Co.*, 50 I.C.C. 515, 520-521 (1918); *Iowa Railroad Commissioners* v. *Director General*, 63 I.C.C. 405, 408-409 (1921); *Helena Traffic Bureau* v. *M.P.R.R.Co.*, 89 I.C.C. 405, 410 (1924); *Mississippi R.R. Comm'n* v. *A. & V. Ry. Co.*, 93 I.C.C. 435, 444-445 (1924).

The rail grain rate structure from midwestern points to the east had been constructed for fifty years on the basis of area groupings graduated according to distance (see Exs. 57, 61, R. 813-816) and designed generally to equalize the opportunity of movement from local origins to any of various midwestern grain markets and thence to the east. *In the Matter of the Applications Of Carriers in Official, Southern and Western Territories For Authority to Increase Rates*, 58 I.C.C. 220, 252-253 (1920). Rates

from Illinois to the east had been constructed as a combination of proportional or local gathering rates to Chicago as the principal corn market and the Chicago proportional to the east (Ex. 58, R. 813) and applied equally via all the Illinois markets including Kankakee. The development of this equalized grain rate structure with equal opportunity of movement through the many processing centers gave rise to the reciprocal routing from Kankakee via Chicago and from Chicago via Kankakee to the east for grain and grain products on equal proportional rates. *This reciprocity of opportunity of movement is the sole source of the NYC's contention that by disrupting the reciprocity with a special rate applicable via Kankakee and not usable via Chicago it can save the cost of transporting corn between Chicago and Kankakee, and thereby make the Belt rate compensatory in the sense of increasing the railroad applicants' net revenues beyond those earned from the reshipping rate which they receive on ex-barge as well as ex-Belt corn. Thus the decision as to whether or not the Belt rate is compensatory under Section 4 is inextricably intertwined with the disruption of the traditional equal rate treatment of which the Board of Trade complains under Section 3.* A rational decision under Section 4 cannot be made without the decision under Section 3 which the Commission refused to make.

Similarly the reshipping rate from Kankakee and Chicago were designed to cover the cost of the widely circuitous movements allowed under them (R. 378-379) and illustrated in Exhibit 61. If rates are to be constructed via Kankakee so as to restrict this circuitous movement in order to subsidize a non-compensatory inbound rate, in all fairness to the applicants' connecting carriers at Chicago and in order to comply with Section 3(4), a similar restriction in rout-

ing should be offered with a specially reduced reshipping rate from Chicago to compensate for the subsidization of the inbound rate to Kankakee.

These questions are of course substantive questions not passed upon by the Commission and not ripe for decision by this Court. They only illustrate the reason why the Commission could not reasonably restrict the issues in this proceeding to those arising solely under Section 4 and demonstrate the inadequacy of the offhand remarks of the Commission to decide the important questions under Section 3.

In their briefs, counsel for the Commission and the NYC attempt to supply findings, conclusions and arguments not made by the Commission which, in their opinion might justify ignoring the Board of Trade's (and Plaintiffs-Appellants) charges of discrimination (I.C.C. Br. pp. 34-37; NYC Br. pp. 27-28). There is, of course, much that could be said to demonstrate the substantive errors they involve but it is enough to note that the Commission made no such "findings", expressed no such "conclusions," and therefore attempted no such rationalization. No one can at this late date do the work which the Commission is required to do. The Commission's Report must show on its face the findings and analysis which form the basis for its decision on the material issues in the proceeding. *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 167-168 (1962); *United States* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 294 U.S. 499, 510-511 (1935); Sec. 8(10) of the Administrative Procedure Act, 5 U.S.C. §1007 (b). This report manifestly does not show a substantive basis (apart from the procedural objection that the protestants did not file a complaint under Section 13) for denying relief against the violations of Section 3.

The Commission further made no findings with respect to relevant standards under the National Transportation Policy other than its finding that Mechling's weighted average fully distributed costs for service to Chicago were 4.4¢ per cwt., compared to the NYC's average fully distributed costs for the haul from Belt station to Kankakee of 13.57¢ to 14.33¢ per cwt. (R. 26).

Again the Commission's counsel tries to supply findings by comparing Mechling's *average cost* of 4.4¢ per cwt. for hauls from the *six* most competitive ports with its *average rates* from the *ten* ports used for comparison by the NYC in its Exhibit 10 (I.C.C. Br. p. 46). This comparison of unlike costs and rates is highly unfair and misleading.[11] By reason of its intermediate location among the six ports used in Mechling's cost study and its origination of much greater traffic than any of the other ports, Morris is the port nearest to the average (See Ex. 35, R. 640). The barge *rate* from Morris *after* the increase in December 1957, referred to by the Commission's counsel, was 4.4¢ per cwt. (R. 618), or exactly what the Commission found Mechling's average *cost* to be. Thus the rate increase in December 1957 was necessary to enable Mechling to recover its fully distributed costs on the traffic. It was followed, as the examiner found, by increasing diversion of traffic to the Belt; and this diversion would be so enhanced, if the milling-in-transit requirement were removed to mitigate the discrimination against Chicago, as to spell the elimination of this barge transportation (R. 50). The Commission conspicuously refrained from saying the contrary.

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[11] Mechling had no warning that Exhibit 10 would include the more distant (and therefore higher-rated) downstream ports of Henry, Hennepin and Lacon, since those ports were not referred to in the application for relief or the subsequent litigation for a temporary injunction. It prepared its cost exhibit with reference to the six ports named in the application and the litigation.

The Commission made no findings on this point, and has in no wise satisfied the requirements of the *New Haven* case.[12]

Nor does the contention of the NYC that it has the short route *via* Kankakee satisfy the requirements of *New Haven*, since it depends on the false assumption that all *ex-barge* corn at Chicago displaced in eastern markets by the Kankakee Belt corn, would have to go over the NYC's circuitous route down to Kankakee in order to get to its eastern destination; and on the further assumption that the NYC can not only reduce, but wholly and permanently prevent, any movement of corn from the Kankakee Belt through Chicago[13] (NYC Br. pp. 50-52). (The latter assumption aggravates the already grave discrimination against Chicago.)

The validity of this latter assumption depends upon the perpetuation of applicants' unlawful preference of Kankakee over Chicago, and makes even more obviously necessary the determination of all the legal questions with respect to these rates in one proceeding. Only if applicants can avoid the necessity in this proceeding of facing the discrimination against Chicago can they make specious arguments about savings effected by avoiding the circuitous haul from Chicago to Kankakee, *without having to answer for the cost of added haul from Kankakee to Chicago.* By taking the matter piece-meal they argue that the rate is compensatory when the corn goes directly east

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[12] *Interstate Commerce Commission* v. *New York, New Haven & Hartford R. Co.*, 372 U.S. 744 (1963) holds that the rails cannot go below their *fully distributed* costs if that compels the competing water carriers to go below their own *fully distributed* costs to compete. The Commission has made no findings whatever on this point. See pp. 32-33 of plaintiffs-appellants' brief.

[13] In making this argument the NYC freely admits that the Kankakee Belt corn displaces ex-barge corn via Chicago that would have gone east (NYC Br. p. 50).

via Kankakee—which discriminates against Chicago. If on *that* basis the rate were held compensatory, and the rails then should make it usable on the circuitous route via Kankakee *and* Chicago by removing the restriction against corn milled in transit, they would argue that the rate had been held compensatory and that discrimination against Chicago had been removed! That would require another costly proceeding, duplicating averments made and evidence received on this record, for in the Commission's report there is no pretense that the rate is compensatory when the cost of movement from Kankakee to Chicago is considered.

II. THE 5½¢ RATE IS NOT COMPENSATORY AS IT IS REQUIRED TO BE BY SECTION 4.

Only the Solicitor-General and the NYC have seen fit to mention either the language of Section 4 or the legislative history of the Transportation Act of 1920 to construe the meaning of the proviso in Section 4 prohibiting Commission authorization "of any charge to or from the more distant point that is not reasonably compensatory for the service performed".[14] Their discussion is limited to con-

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[14] At pages 16-17 of its brief the Commission may have tried, by referring to "charges to the more distant points," to avoid the force of plaintiffs-appellants' contention that this proviso applies in this case to the 5-½¢ origin rate, because the origins here are the more distant points, the destinations being common for hauls from both the Belt stations and the intermediate stations in Indiana. The application made clear that relief was sought for departures at the origins via both direct and indirect routes (the application having been submitted before the 1957 amendment to Section 4 was enacted):

> "Additional relief is therefore necessary at origin; thus this application." (R. 144).

The proviso prohibits *any* non-compensatory charge *from* the more distant point.

sideration of one paragraph of Senator Townsend's debate and citation (by the NYC) of three Commission decisions rendered *before enactment of the proviso.*

In addition the NYC characterizes as "strained argument" plaintiffs-appellants' contention that when the new and different words "any charge to or *from* the more distant point" were used by Congress in 1920 in the newly-enacted proviso, it intended to, and did, have a new and different meaning from that of the old and different words "any greater compensation in the aggregate" enacted many years earlier in the first sentence of Section 4. Yet one of the most fundamental principles of statutory construction is that the use of different words having different meanings in separately enacted statutes must be construed as intending the differences in meaning which the words have in normal usage, at least in the absence of legislative history convincingly demonstrating the contrary. *Brewster* v. *Gage*, 280 U.S. 327, 337 (1930); *Crawford* v. *Burke*, 195 U.S. 176, 189-190 (1904); *Pirie* v. *Chicago Title & Trust Company*, 182 U.S. 438, 448 (1901).

No one has shown any history of the enactment of the Transportation Act of 1920 which would indicate any purpose on the part of Congress to restrict the broad meaning of "*any* charge to or from the more distant point" to the narrower meaning "charge . . . any greater compensation in the aggregate." On the contrary, the paragraph from Senator Townsend's debate cited by the Solicitor General,[15]

[15] "It has been wrong and is so now to fix the longer-haul rate so low that in itself it is not compensatory; that is, it does not yield its proper portion of the expense of operation of the railroad system. Then it stands to reason that *shorter routes paying the higher proportioned rate must have an additional burden placed on them.* That is wrong." (59 Cong. Rec. 740).

(even though stripped of its context showing how he deplored the maintenance of low rail rates designed to prevent development of any water competition on the rivers) shows clearly that he thought it wrong to maintain rates which were non-compensatory because they placed a burden on other traffic. It is not surprising therefore that in his next sentence he emphasized that the proviso he proposed would permit *no* rate to be fixed by the Commission which in itself is not compensatory.[16]

These statements, moreover, must be viewed in light of the general purpose of Congress in the Transportation Act of 1920, of which the proviso was a part, to enact substantial protection for water carriers, not theretofore found in the Act, against predatory rate practices of the railroads.[17] There can be no doubt that Congress intended absolutely[18] to outlaw "any" non-compensatory rail

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[16] "When the committee had the bill before it I offered an amendment to that provision, which was adopted, which states positively that no rate shall be fixed by the Commission which is not compensatory; . . ." (Ibid)

[17] See the Committee Reports as quoted and discussed at pages 23-24 of plaintiffs-appellants' opening brief. The Transportation Act of 1920, for its first time, forbade non-compensatory rail rates, for the reason, repeatedly stated in the Committee Reports, that thereby the railroads could first reduce the number of vessels in water transportation and then put the competitive rail rates back up again "to even higher costs" so that "the public was no better off and was, in fact, worse off than before." (loc. cit.)

[18] The outlawry is absolute even though shippers might derive a temporary advantage from reduction in the rates, as appellees insist shippers will in this case. Congress had had ample demonstration of how illusory and expensive such "advantage" proved in the long run and allowed no discretion on this point.

Incidentally, the Commission's hypothetical suggestion of an 8-½¢ advantage to farmers from the below-cost competi-

"charge", to or from any more distant and competitive point, designed to divert traffic from the water carriers. The care taken to protect water carriers in the subsequent Transportation Act of 1940, with its injunction to construe all sections of the Act in accordance with the National Transportation Policy, has been well set forth by this Court in *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567 (1947).

No purpose of either Senator Townsend or Congress can be served by permitting the establishment of non-compensatory competitive rate factors by so transparent a device as is attempted here.[19] Non-compensatory rail rates are cut-throat rates, and have had no defenders in Congress since

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[18] (Continued)

tive 5-½¢ rail charge, relied on by the Commission in its Motion to Dismiss or Affirm, is not supported by the record as pointed out in our answer to that motion, note 2.

In the same connection, counsel's suggestion that there were no competitive bids for the farmer's grain prior to the below cost rail rate ignores the obvious fact that elevators were in competition with each other for river shipment of corn. Again, there is no finding by the Commission of any absence of competition between river shipping elevators in the accumulation of corn for river shipment.

[19] Although the NYC still says the rates might have been filed as one-factor through rates, there is still no evidence in the record that it could have obtained the consent of its connecting carriers to do this. Had it been done, the separate segments might then have still been subjected to examination. Cf. *Arrow Transportation Company* v. *United States*, 176 F. Supp. 411 (N.D. Ala., 1959); *aff'm'd on motion*, 361 U.S. 353 (1960). Suffice it to say for now that one-factor rates were not filed, and there is no evidence they could have been.

1920. Why, then, ignore the plain meaning of the words of Congress to save a practice so consistently condemned?[20]

On still another basis the proposed through rates must be found non-compensatory. To be reasonably compensatory the proposed rates must be found to produce more net revenue for the participating carriers than they would realize without the rate. *Transcontinental Cases of 1922*, 74 I.C.C. 48, 71 (1922); *Transcontinental Westbound Automobile Rates*, 209 I.C.C. 549, 559-561 (1934). It is agreed by the NYC (Br. p. 50) that the Belt corn attracted by the 5½¢ rate displaced ex-barge corn that would have gone

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[20] If, as the Commission supposed, when the Belt corn is nearly all going east directly from Kankakee (without expensive movement to Chicago) the revenue from the non-competitive eastern factor would subsidize the loss on the competitive inbound 5-½¢ factor, that would not cure the mischief against which the Transportation Act of 1920 was directed, for subsidy of competitive, below-cost charges with revenue from non-competitive business, is the classic device of strangling monopoly. In connection with the non-competitive eastbound factor, it will be borne in mind that:

> "A zone of reasonableness exists between maximum and minimum within which a carrier is ordinarily free to adjust its charges for itself" (*U.S. v. Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 294 U.S. 499, 506), a principle under which the maximum reasonable rate is ordinarily determined by "the well-known rule of 'what the traffic will bear'" (*Livestock-Western District Rates*, 176 I.C.C. 1, 82-83) in accordance with the theory "that the carrier should decide what, in view of all the circumstances, the articles could afford to pay and then charge neither more nor less—certainly not less, because then the profit would be lower than it otherwise would, and not more, because a higher charge would curtail the amount of the traffic and the revenue derived therefrom, or possibly destroy the shipper and lose all his freight." P. 15, *Comparison of Rail, Motor and Water Carrier Costs*, prepared by the Board of Investigation and Research of the Commission, S. Doc. No. 84, 79th Congress, 1st Session, dated September 20, 1944.

east from Chicago by rail.[21] Thus the applicant railroads would have received the reshipping rate to the east in any event. The only additional revenue they receive for the haul into Kankakee is the 5½¢ rate, and the 5½¢ is not sufficient to cover the out-of-pocket costs of the haul.

None of the appellees has sought to answer this point directly, other than by the spurious argument noted before that the expense of the NYC's circuitous route from Chicago to Kankakee is saved on all the corn purchased off the Belt. Again it must be noted that more direct routes from Chicago to points other than Kankakee via applicant carriers other than the NYC would normally be used by the ex-barge corn displaced by the Belt corn. Again it must be emphasized that should the unlawful discrimination against Chicago be halted, and Chicago be permitted to use the rate, the alleged saving would become a further loss, because the cost of movement from Kankakee to Chicago would be added to the loss already incurred on the haul to Kankakee. There is no way for the rate to meet the requirements of Sections 3 and 4 at the same time, and the order approving it must be vacated for it is inconceivable that Congress contemplated that the Commission should authorize rates that Congress condemned as unlawful discriminations. This Court holds that the Commission's duty is to administer the Act "as a whole." *American Trucking Association* v. *United States*, 355 U.S. 141, 152 (1957).

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[21] The New York Central's acknowledgment makes it unnecessary to discuss the fallacy of counsel for McNabb Grain Company on page 29 of his brief. There counsel compares the eastbound rail movement of corn only from Chicago with the *total* inbound barge movement (not just that from this area) during 1956, finding the barge movement larger, and concludes that the ex-barge corn at Chicago could not have gone primarily to the east as the witnesses testified it did. He ignores the rail movement from Chicago to the east of corn products milled from ex-barge corn.

III. THE 5½¢ RATE IS DESTRUCTIVE.

In discussing the level of the rate, the Commission and the NYC have contented themselves in their briefs with the recitation of the increased barge corn movement to Chicago in 1957 over 1956 and the usual litany on the limited power of the court to review the Commission's orders. No attempt was made to explain the logic of ignoring the many other factors contributing to the temporary 1957 increase while concluding that the increase showed no serious loss to the barge lines could result from the rate. Only counsel for McNabb doubted plaintiffs-appellants' recital of the evidence showing the certain prospect of substantial future increases in the diversion of corn from the barges to the Belt (Br. p. 52) and his doubt resulted only from overlooking the copious record citations to this evidence given in the last paragraph on page 17 in plaintiffs-appellants' Statement of the Case.

It is no accident that this evidence is not challenged on substantive grounds. In its Reply to Petitions the NYC had forecast that expansion of Belt elevator capacity would enable them to reduce the barge movement into Chicago to a minimum of about 20,000,000 bushels (R. 268). Examination of the Statistics of the Board of Trade of the City of Chicago, 1963,[22] shows that by 1963 the declining amount of corn received in Chicago via the Illinois Waterway had fallen to 16,054,000 bushels from in excess of 34,000,000 bushels in 1957. This sharp drop demonstrates graphically why even expert bodies must be compelled by reviewing courts to use logic in drawing conclusions from facts. *Public Service Commission of Utah* v. *United States*, 356 U. S. 421 (1958).

[22] Not yet published.

None of the Respondents attempts any defense (see our opening brief, pp. 38-39) of the Commission's theoretical adjustment (R. 17) of *actual* river and rail bids (bids made by people buying *from* country elevators (R. 655, 656)) as a rational basis for its conclusion that the below-cost rail rate was not destructive. This "adjustment" was made by eliminating from the calculation of the country elevator's bid (to the farmer) on corn to go *by river*, of the country elevator's markup (or "cost" as the report (R. 17) calls it). Such a deduction from the bid to the farmer is, however, common to bids *to the farmer* whether the corn is to go by river or by rail. (R. 743, 772, 824) The Commission's one-sided elimination of an item common to both river and rail transportation is particularly inexcusable, when the Commission makes no finding on the cogent and uncontradicted evidence that constrains the Commission's examiner, who heard it, to conclude that continuance of the below-cost rail rate involves a great and progressive diversion of traffic from the river to the rails and one that would be so increased (if the discrimination against Chicago were mitigated by removing the milling-in-transit restriction) as to portend, not just great diversion, but complete elimination of the barge transport of this traffic. (R. 50)

CONCLUSION.

The Commission has refused without prior warning to decide legal questions which could not reasonably be doubted to be in issue under the Commission's long-standing and frequently reiterated practice, issues that were made by the protests and the railroad replies to those

protests on which the Commission granted and held a hearing. The Commission refused to decide these questions for the sole reason that only by so refusing could it shut its eyes to illegalities of the rate it authorized, whose progressive injury to plaintiffs-appellants cannot yet be measured, but is already greater than the applicant railroads said they expected and intended. In authorizing the rate the Commission ignored the plain language of the statute under which it was required to act, and refused to follow its own stated understanding of the Transportation Act of 1920, that a group of rail carriers may not use fourth-section departure rates to divert traffic from water carriers merely to injure water carriers—without any showing or finding of reasonable expectation of increased net revenue for the rail carriers as a group.

Respectfully submitted,

EDWARD B. HAYES
WILBUR S. LEGG
Attorneys for Plaintiffs-Appellants

Of Counsel
LORD, BISSELL & BROOK
Room 2500
135 S. LaSalle Street
Chicago, Illinois 60603
Telephone: 346-7475

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